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**LIMITE**

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**NOTE**

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From: Presidency

To: Working Party on Information Exchange and Data Protection

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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)

- Public sector and Chapter IX

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**I. General**

1. The purpose of this Presidency note is to find an integrated solution for the following issues:
  - the inclusion of the public sector in the scope of the draft General Data Protection Regulation (hereinafter referred to as the 'GDPR') and the leeway that Member States should be given in this regard; and
  - concomitantly with this, the need for specific data protection regimes in Chapter IX.

2. The former question, which is one of particular sensitivity and importance to delegations, was already debated at the JHA Informal Ministerial Meeting in Nicosia in July 2012 and at the JHA Council meetings in October and December 2012. At the latter Council meeting it was decided that the question as to whether and how the Regulation could provide flexibility for the Member States' public sector, would be decided following completion of the first examination of the text of the GDPR. More recently, at the informal Ministerial Meeting in Milan on 9 July 2014 an overall majority of Member States supported the idea of a GDPR, but the need to provide Member States with sufficient leeway to determine the data protection requirements applicable to the public sector was also emphasised.
3. During the discussions at technical level on the GDPR, it emerged that there is a need for tailoring the application of some data protection rules to take into account the specificities of the public sector. The principle of public access to official documents was also taken expressly into account. As a consequence, the draft GDPR now contains a significant number of provisions which are specifically tailored to the needs of public authorities and bodies in their capacities as controllers or processors. In some instances application to the public sector has been excluded (e.g. the right to data portability or the right to be forgotten),
4. Irrespective of the drafting of specific articles in the GDPR, at a general level three different techniques have been examined that may offer certain leeway to the Member States' public sector to modulate the requirements of the Regulation in accordance with specificities of their constitutional, legal and institutional set-up.

## **II. Different legal techniques used**

5. At a general level three different techniques have been introduced in the Regulation to offer certain leeway to the Member States' public sector to modulate the requirements of the Regulation in accordance with specificities of their constitutional, legal and institutional set-up.

**a. Detailing the scope of national law as a legal basis for data processing**

6. The Regulation does not require Member States to abrogate specific laws in data protection in the public sector. On the contrary, it allows Member States to specify the rules of the Regulation for certain areas of the public sector. The current wording of Article 6 (3) indicate what type of details may be specified by national or Union law in order to ensure the appropriate level of protection. This clarifies that Member States may lay down a number of further specifications in their domestic law as far as they do not derogate from the rules laid down in the GDPR. For instance it is possible for Member States to determine in their national law specific cases of further processing or cases of profiling which would meet the criteria laid down in the Regulation although it is unclear whether they can adopt more protective provisions in this regard. The Member States can in the future adopt more specific laws, as far as there is no contradiction with the Regulation.

**b. Restricting data protection rights and obligations by national law**

7. A second legislative technique is that of Article 21, which allows Member States through national law to restrict certain rights and obligations when such restriction constitutes a necessary and proportionate measure in a democratic society to safeguard a number of public interests as well as the protection of the data subject and the rights and freedoms of others. This is in fact a traditional human rights clause based on the necessity and proportionality tests, which allows certain justified limitations to the protected fundamental right. This technique applies both to the private and public sector, even though it can obviously be applied much more easily and frequently regarding personal data processed by public authorities. As is the case for Article 6(3), Article 21 does not allow a Member State to lay down a higher level of data protection.

**c. Specific data protection regimes**

8. Thirdly, Chapter IX of the GDPR provides for a number of specific data protection regimes for specific types of processing. Chapter IX also allows churches and religious associations to maintain their existing data protection rules, within certain parameters. It has also been proposed that provisions be added to Chapter IX. Irrespective of the exact wording of Chapter IX, it is clear that this approach has definite limits and that it will be very difficult to list all possible areas in which specific data protection regimes may be needed.

### III. Presidency proposal

9. The Presidency proposes a three-pronged solution, consisting of:
  - a) a horizontal minimum harmonisation clause for the public sector;
  - b) further detailing the legislative powers of Member States in case processing is necessary for compliance with a legal obligation or necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; and
  - c) a revised version of Chapter IX restricted to those specific cases which are not (fully) covered by the horizontal minimum harmonisation clause for the public sector and/or for which there is a justified and circumscribed need to include them in Chapter IX.

*a. Allow Member States to provide for a higher level of protection: minimum harmonisation for the public sector*

10. The GDPR seeks to replace the 1995 Data Protection Directive<sup>1</sup>. The choice of a Regulation as the legal instrument to replace a Directive is motivated by the goal to create a level playing field in terms of data protection legislation. This level playing field implies primarily that the rights of data subjects and the corresponding obligations of controllers regarding the protection of personal data are identical in all Member States. This goal already underlies the current Data Protection Directive, which is aimed at establishing an equivalent level of protection in all Member States (recital 8) and which, according to the ECJ, should be interpreted as seeking to generally achieve complete harmonisation<sup>2</sup>. This implies that the obligations in the Directive to protect personal data constitute both the minimum and maximum level of protection that Member States may impose in this regard.

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<sup>1</sup> OJ L 281, 23.11.1995, p. 31.

<sup>2</sup> ECJ, Lindqvist, C 101/01, judgment of 6 November 2003, paragraph 96.

11. This goal is less relevant with regard to personal data which are collected and further processed by public authorities or bodies in the exercise of their public duties. From an early stage in the discussions some Member States have therefore pleaded for more flexibility regarding data protection rules for the public sector so as to enable them to adapt these rules to their national regimes. The Commission, on the other hand, argues that EU citizens are entitled to expect similar levels of data protection in the public sector in Member States, given that the fundamental right to data protection does not differentiate between the public and private sector. Another argument from the Commission is that harmonisation in this area is also necessary as cross-border exchange of data is also increasing between public authorities. However, such transfer does take place in the context of cooperation between public authorities. If authorities in different Member States apply different data protection standards, this may constitute an obstacle to the exchange of information between those authorities but the free movement of data as required by Article 16 TFEU may be ensured by the free movement clause, as currently contained in Article 1(3) of the draft Regulation.
  
12. Contrary to the situation in the case of private entities there is, however, no “free” flow of personal data between public authorities. They may exchange personal data only when expressly authorised to do so. Various EU sectoral instruments (e.g. in the field of health, banking and financial markets supervision, agriculture, taxation or social security) have regulated the conditions that Member States may attach to the exchange of information, including personal data, between their authorities. These conditions vary in nature and many of them are not linked to data protection concerns. Even if the GDPR were to be adopted as proposed by the Commission, these sectoral EU rules would continue to apply (*lex specialis*). It is therefore difficult to see what impetus would be given by the GDPR to the alleged free flow of personal data between public authorities of various Member States.

13. Allowing Member States to provide for a higher level of protection under national law coupled with a free movement clause would be in line with the changed legal basis (Article 16 TFEU); it is indeed difficult to see why Member States should be prevented from providing for a higher level of protection for fundamental rights. The Framework Decision of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters already explicitly states it that it does not 'preclude Member States from providing, for the protection of personal data collected or processed at national level, higher safeguards than those established in [the] Framework Decision' (Article 1(5)).
14. The minimum harmonisation clause proposed by the Presidency in paragraph 2a of Article 1 needs to be read in conjunction with the free movement clause already laid down in paragraph 3 of that Article. This implies that controllers established in Member States where the level of protection is that of the Regulation would benefit from the free movement of personal data and Member States with a higher level of protection could not 'impose' their high level on them.

b. *Clarify the legislative powers of Member States*

15. The Danish delegation has made a number of proposals<sup>3</sup> to clarify the legislative powers that Member States have when processing of personal data is carried out on the legal bases referred to in paragraphs (c) and (e) of Article 6, that is 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. The Presidency has taken over these proposals in the attached proposal.

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<sup>3</sup> 11640/14 DATAPROTECT 101 JAI 590 MI 531 DRS 95 DAPIX 99 FREMP 139  
COMIX 364 CODEC 1581.

*c. Clarify in Chapter IX sectors where specific or derogatory data protection regimes apply*

16. Chapter IX of the GDPR provides for a number of specific data protection regimes for specific types of processing. This is the case for the processing of personal data in the health sector and in an employment context, as well as for processing for archiving, historical, scientific and statistical purposes. Moreover, it has been proposed that provisions be added to Chapter IX regarding the processing of genetic data, the processing of personal data in public registers, in the context of social protection, taxation and education purposes (schools).
17. At the moment there appears to be no clear view as to what the exact implications are of the listing of certain processing areas in Chapter IX. Some provisions appear merely to state that Member States may adopt specific rules for the processing of personal data within a certain area, which already flows from the fact that the legal basis for processing will in most cases be found in national law (Article 6(3)). Therefore the unclear condition “within the limits of this Regulation” needs to be deleted, as this creates uncertainty regarding the exact implication of the specific rules set out in Chapter IX.
18. The inclusion of a horizontal minimum harmonisation clause for the public sector does, however, away with the *raison d'être* of a number of proposed clauses, such as those related to public registers, social protection and taxation. All these domains are covered by the horizontal clause of Article 1(2a). The Presidency only sees a need for retaining those clauses which relate to specific domains of processing that may be carried out both by private and public controllers, such as archiving, historical, scientific or statistic processing and for which there is a justified need to derogate from some of the rules of the GDPR.
19. For two specific domains which are not specific public sector domains, namely processing of genetic data and processing in an employment context, there appears to be a justified need to allow Member States to provide for a higher level of data protection. The modified language of Articles 81a and 82 seeks to reflect this.  
For health data, the inclusion in Chapter IX, is justified by the fact that these are a special category of data and the proposed provision lays down a number of conditions under which those data can be processed.

20. *In light of the above, delegations are invited:*

- 1) *to indicate whether they are satisfied with the proposed three-pronged solution; and*
  - 2) *to discuss the proposed drafting of Article 1(2a), 6(3) and of Chapter IX, as well as of the corresponding recitals*
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- 7) The objectives and principles of Directive 95/46/EC remain sound, but it has not prevented fragmentation in the way data protection is implemented across the Union, legal uncertainty and a widespread public perception that there are significant risks for the protection of individuals associated notably with online activity. Differences in the level of protection of the rights and freedoms of individuals, notably to the right to the protection of personal data, with regard to the processing of personal data afforded in the Member States may prevent the free flow of personal data throughout the Union. These differences may therefore constitute an obstacle to the pursuit of economic activities at the level of the Union, distort competition and impede authorities in the discharge of their responsibilities under Union law. This difference in levels of protection is due to the existence of differences in the implementation and application of Directive 95/46/EC.
- 8) In order to ensure a consistent and high level of protection of individuals and to remove the obstacles to flows of personal data within the Union, the level of protection of the rights and freedoms of individuals with regard to the processing of such data should be equivalent in all Member States. Consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data should be ensured throughout the Union. **Regarding 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, Member States should be allowed maintain or introduce national provisions ensuring a higher level of protection than that provided for in this Regulation, except for those cases where this Regulation lays down specific regimes of data protection.**

- 9) Effective protection of personal data throughout the Union requires strengthening and detailing the rights of data subjects and the obligations of those who process and determine the processing of personal data, but also equivalent powers for monitoring and ensuring compliance with the rules for the protection of personal data and equivalent sanctions for offenders in the Member States.
- 10) Article 16(2) of the Treaty mandates the European Parliament and the Council to lay down the rules relating to the protection of individuals with regard to the processing of personal data and the rules relating to the free movement of personal data.
- 11) In order to ensure a consistent level of protection for individuals throughout the Union and to prevent divergences hampering the free movement of data within the internal market, a Regulation is necessary to provide legal certainty and transparency for economic operators, including micro, small and medium-sized enterprises, and to provide individuals in all Member States with the same level of legally enforceable rights and obligations and responsibilities for controllers and processors, to ensure consistent monitoring of the processing of personal data, and equivalent sanctions in all Member States as well as effective co-operation by the supervisory authorities of different Member States. The proper functioning of the internal market requires that the free movement of personal data within the Union should not be restricted or prohibited for reasons connected with the protection of individuals with regard to the processing of personal data. To take account of the specific situation of micro, small and medium-sized enterprises, this Regulation includes a number of derogations. In addition, the Union institutions and bodies, Member States and their supervisory authorities are encouraged to take account of the specific needs of micro, small and medium-sized enterprises in the application of this Regulation. The notion of micro, small and medium-sized enterprises should draw upon Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

31) In order for processing to be lawful, personal data should be processed on the basis of the consent of the person concerned or some other legitimate legal basis laid down by law, either in this Regulation or in other Union or Member State law as referred to in this Regulation, including the necessity for compliance with legal obligation to which the controller is subject or the necessity 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. **Whereas a legal obligation does not necessarily require a legislative act adopted by a parliament, it should be clear and precise and its application foreseeable for those subject to it as required by the case law of the Court of Justice of the European Union**<sup>4</sup>.

**35a) This Regulation provides for general rules on data protection. However in specific cases Member States are also empowered to lay down national rules on data protection. The Regulation does therefore not exclude Member State law that defines the circumstances of specific processing situations, including determining more precisely the conditions under which processing of personal data is lawful. National law may also provide for special processing conditions for specific sectors and for the processing of special categories of data**<sup>5</sup>.

36) Where processing is carried out in compliance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority, the processing should have a (...) basis in Union law or in the national law of a Member State. (...). It should be also for Union or national law to determine the purpose of the processing. Furthermore, this (...) basis could **specify the general conditions of the Regulation governing the lawfulness of data processing**, determine specifications for determining the controller, the type of data which are subject to the processing, the data subjects concerned, the entities to which the data may be disclosed, the purpose limitations, the storage period and other measures to ensure lawful and fair processing. It should also be for Union or national law to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public authority or another natural or legal person governed by public law, or by private law such as a professional association, where grounds of public interest so justify including for health purposes, such as public health and social protection and the management of health care services.

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<sup>4</sup> BE proposal.

<sup>5</sup> DK proposal.

- 121) Member States law should reconcile the rules governing freedom of expression, including journalistic, artistic and or literary expression with the right to the protection of personal data pursuant to this Regulation, in particular as regards the general principles, the rights of the data subject, controller and processor obligations, the transfer of data to third countries or international organisations, the independent supervisory authorities and co-operation and consistency. In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly. (...)
- 122) (...) Special categories of personal data which deserve higher protection, may only be processed for health-related purposes where necessary to achieve those purposes for the benefit of individuals and society as a whole, in particular in the context of the management of health-care services and ensuring continuity of health-care and cross-border healthcare. Therefore this Regulation should provide for harmonised conditions for the processing of special categories of personal data concerning health, in respect of specific needs, in particular where the processing of these data is carried out for certain health-related purposes by persons subject to a legal obligation of professional secrecy, which may cover different types of confidentiality<sup>6</sup>. Union or Member State law should provide for specific and suitable measures so as to protect the fundamental rights and the personal data of individuals. (...).

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<sup>6</sup> Drafting suggestion in order to clarify that the professional secrecy also covers other forms of confidentiality that may exist in some Member States.

- 123) The processing of special categories personal data concerning health may be necessary for reasons of public interest in the areas of public health, without consent of the data subject. This processing is subject to for suitable and specific measures so as to protect the rights and freedoms of individuals. In that context, ‘public health’ should be interpreted as defined in Regulation (EC) No 1338/2008 of the European Parliament and of the Council of 16 December 2008 on Community statistics on public health and health and safety at work, meaning all elements related to health, namely health status, including morbidity and disability, the determinants having an effect on that health status, health care needs, resources allocated to health care, the provision of, and universal access to, health care as well as health care expenditure and financing, and the causes of mortality. Such processing of personal data concerning health for reasons of public interest should not result in personal data being processed for other purposes by third parties such as employers, insurance and banking companies.
- 124) **Regarding some types of processing of personal data, such as the processing in the employment context or the processing of genetic data, Member States should be allowed to maintain or introduce national provisions ensuring a higher level of protection than that provided for in this Regulation, even if this processing is not carried out for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. Those national provisions should include safeguards for the rights and freedoms of employees in the employment context.**

124a)(...)

125) The processing of personal data for historical, statistical or scientific (...) purposes and for archiving purposes in the public interest should, in addition to the general principles and specific rules of this Regulation, in particular as regards the conditions for lawful processing, also comply with respect other relevant legislation such as on clinical trials. The processing of personal data for historical, statistical and scientific purposes and for archiving purposes in the public interest should not be considered incompatible with the purposes for which the data are initially collected and may be processed for those purposes for a longer period than necessary for that initial purpose, subject to specific safeguards and provided that the controller provides appropriate measures to safeguard the rights and freedoms of the data subject, *including control of access (...) and restricted access in cases where such access would or might affect the rights and freedoms of natural persons. The controller should in particular ensure that the data are not used for taking measures or decisions which might affect particular individuals.* Member States should be authorised to provide, under specific conditions, specifications and derogations to the information requirements and the rights to erasure, restriction of processing and on the right to data portability, and to determine that rectification may be exercised exclusively to the provision of a supplementary statement, taking into account the specificities of processing for historical, statistical or scientific purposes and for archiving purposes in the public interest.

125a)(...) The confidential information which the Union and national statistical authorities collect for the production of official European and official national statistics should be protected. European statistics should be developed, produced and disseminated in conformity with the statistical principles as set out in Article 338(2) of the Treaty of the Functioning of the European Union, while national statistics should also comply with national law. Union law or national law should, within the limits of this Regulation, determine statistical content, control of access, specifications for the processing of personal data for statistical purposes and appropriate measures to safeguard the rights and freedoms of the data subject and for guaranteeing statistical confidentiality.

Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics and repealing Regulation (EC, Euratom) No 1101/2008 of the European Parliament and of the Council on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities, Council Regulation (EC) No 322/97 on Community Statistics, and Council Decision 89/382/EEC, Euratom establishing a Committee on the Statistical Programmes of the European Communities<sup>7</sup> provides further specifications on statistical confidentiality for European statistics.

125b)The importance of archives for the understanding of the history and culture of Europe<sup>22</sup>—and “that well-kept and accessible archives contribute to the democratic function of our societies”, as underlined by Council Resolution of 6 May 2003 on archives in the Member States<sup>8</sup>.

Where personal data are processed for archiving purposes in the public interest, this Regulation should also apply to that processing, bearing in mind that this Regulation should not apply to deceased persons, unless information on deceased persons impinges the interests of data subjects<sup>9</sup>.

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<sup>7</sup> OJ L 87, 31.3.2009, p. 164–173.

<sup>8</sup> OJ C 113, 13.5.2003, p. 2.

<sup>9</sup> ES and MT thought that it was repetitious to refer to the non-application to deceased persons (also e.g. in recital 126, end first paragraph). MT added that certain sensitive data of deceased could be interesting, for example it would be interesting for a child to know if a deceased parent had a certain illness. MT suggested to add text like "if it did not impinge the interests of other data subjects". Support from EE and SK to the MT suggestion. SK suggested alternatively drafting on the lines that data on deceased persons linked to living persons could be used.

Public authorities or public or private bodies that hold records of public interest should be services which, pursuant to Union or Member State law, have (...) <sup>10</sup> a legal obligation to acquire, preserve, appraise, arrange, describe, communicate, promote, disseminate and provide access to records of enduring value for general public interest. (...) Member States should also be authorised to provide that personal data processed for archiving purposes in the public interest may be further processed (...) for important reasons of public interest<sup>11</sup>, such as providing specific information related to the political behaviour under former totalitarian state regimes, or for safeguarding the rights and freedoms of the data subject or overriding rights and freedoms of others according to Union or Member State law.

(...)

Codes of conduct may contribute to the proper application of this Regulation, when personal data are processed for archiving purposes in the public interest by further specifying appropriate safeguards for the rights and freedoms of the data subject<sup>12</sup>.

- 126) Where personal data are processed for scientific (...) purposes, this Regulation should also apply to that processing. For the purposes of this Regulation, processing of personal data for scientific purposes should include fundamental research, applied research, and privately funded research carried out in the public interest and in addition should take into account the Union's objective under Article 179(1) of the Treaty on the Functioning of the European Union of achieving a European Research Area. Scientific purposes should also include studies conducted in the public interest in the area of public health. (...)

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<sup>10</sup> SE wanted to delete the reference to *main mission* because very few entities have as their main mission to acquire access to records, but it is something that they do, such a drafting would narrow down the scope. Support from DK, IE and EE.

<sup>11</sup> FI thought this phrase should be in the body of the text.

<sup>12</sup> CZ, DK, FI, HU, FR, MT, NL, PT, RO, SE, SI and UK scrutiny reservation.



To meet the specificities of processing personal data for scientific purposes (...) specific conditions should apply in particular as regards the publication or otherwise disclosure of personal data in the context of scientific (...) purposes. Member States should have the possibility to provide for derogations from certain rules of the Regulation. (...). If the result of scientific research in particular in the health context gives reason for further measures in the interest of the data subject, the general rules of this Regulation should apply in view of those measures<sup>13</sup>.

126a) Where personal data are processed for historical purposes, this Regulation should also apply to that processing. This should also include historical research and research for genealogical purposes, bearing in mind that this Regulation should not apply to deceased person, unless information on deceased persons impinges the interests of data subjects. (...).

127) As regards the powers of the supervisory authorities to obtain from the controller or processor access personal data and access to its premises, Member States may adopt by law, within the limits of this Regulation, specific rules in order to safeguard the professional or other equivalent secrecy obligations, in so far as necessary to reconcile the right to the protection of personal data with an obligation of professional secrecy<sup>14</sup>.

128) This Regulation respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States, as recognised in Article 17 of the Treaty on the Functioning of the European Union. As a consequence, where a church in a Member State applies, at the time of entry into force of this Regulation, comprehensive rules relating to the protection of individuals with regard to the processing of personal data, these existing rules should continue to apply if they are brought in line with this Regulation. Such churches and religious associations should be required to provide for the establishment of a completely independent supervisory authority.

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<sup>13</sup> CZ, DK, FI, FR, HU, MT, NL, PT, RO, SE, SI and UK scrutiny reservation. PL suggested to add the following text somewhere in the recital " When data are being processed for historical or archival purposes, the data subject shall have the right to obtain completion of incomplete or out of date personal data by means of providing a supplementary statement."

<sup>14</sup> CZ suggested adding a sentence: "This is without prejudice to existing Member State obligations to adopt professional secrecy where required by Union law".

HAVE ADOPTED THIS REGULATION:

## CHAPTER I

### GENERAL PROVISIONS

#### *Article 1*

#### *Subject matter and objectives*

1. This Regulation lays down rules relating to the protection of individuals with regard to the processing of personal data and rules relating to the free movement of personal data<sup>15</sup>.
  2. This Regulation protects (...) fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.
- 2a. For cases other than those referred to in Articles 81, 83a, 83b, 83c and 83d, Member States may maintain or introduce 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.**

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<sup>15</sup> DE scrutiny reservation: DE 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. 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.<sup>16 17</sup>.

*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<sup>18</sup>.
2. This Regulation does not apply to the processing of personal data:
- (a) in the course of an activity which falls outside the scope of Union law (...);
  - (b) (...);
  - (c) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V the Treaty on European Union;
  - (d) by a natural person (...) in the course of (...) a personal or household activity;

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<sup>16</sup> DK, FR, NL, SI scrutiny reservation. FR thought that this paragraph, which was copied from the 1995 Data Protection Directive (1995 Directive 95/46), did not make sense in the context of a Regulation as this was directly applicable.

<sup>17</sup> 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. This is now regulated in Articles 80 and 80a of the draft Regulation.

<sup>18</sup> 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'.

- (e) by competent public authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences and, for these purposes<sup>19</sup>, **safeguarding of public security**<sup>20</sup>, or the execution of criminal penalties

3. (...).

*Article 6*

***Lawfulness of processing***<sup>21</sup>

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

.....

- (c) processing is necessary for compliance with a legal obligation to which the controller is subject<sup>22</sup>;

.....

- (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<sup>23 24</sup>;

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<sup>19</sup> BE reservation on the terms 'for these purposes'.

<sup>20</sup> This change in wording will need to be discussed, but the Presidency has suggested this change in order to align the text to the suggested text in the Data Protection Directive for police and judicial cooperation.

<sup>21</sup> DE, AT, PT, SI and SK scrutiny reservation.

<sup>22</sup> HU thought that this subparagraph could be merged with 6(1) (e).

<sup>23</sup> COM clarified that this was the main basis for data processing in the public sector. DE, DK, LT and UK 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.

<sup>24</sup> Subparagraphs (d) and (e) might have to be inverted.

3. The basis for the processing referred to in points (c) and (e)<sup>25</sup> of paragraph 1 must be provided for in:

- (a) Union law, or
- (b) national law of the Member State to which the controller is subject.

The purpose of the processing shall be determined in this legal basis or as regards the processing referred to in point (e) of paragraph 1, be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. **This legal basis may specify inter alia the general conditions governing the lawfulness of data processing**<sup>26</sup> the controller, **the type of data which are subject to the processing, the data subjects concerned; the entities to, and the purposes for which the data may be disclosed; the purpose limitation; storage periods and** processing operations and processing procedures, including measures to ensure lawful and fair processing (...).<sup>27</sup>

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<sup>25</sup> FI and SI thought (f) should be added. BE, HU and FR thought (e) should be deleted. NL proposed adding a sentence: 'The purpose of the processing referred to in point (e) must be associated with the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller'.

<sup>26</sup> DK proposal

<sup>27</sup> DE scrutiny reservation; it was emphasised national law should not only have the possibility to specify, but also to enlarge the data protection rules of the Regulation.

# CHAPTER IX

## PROVISIONS RELATING TO SPECIFIC DATA PROCESSING SITUATIONS

### *Article 80*

#### ***Processing of personal data and freedom of expression***<sup>28</sup>

1. **The national law of the**<sup>29</sup> Member State shall (...) reconcile<sup>30</sup> the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression, including the processing of personal data for journalistic purposes and the purposes of academic<sup>31</sup>, artistic or literary expression<sup>32</sup>.
  
2. (...)

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<sup>28</sup> Reservation by BE and IT; scrutiny reservation by DE, EE and SI. BE and UK thought that the balance between competing fundamental rights should be struck by the judiciary and not by the legislature. SE thought that it was important to keep a broad margin of appreciation for Member States. DE thought that in the light of phenomena such as social media and the 'blogosphere', the relationship between data protection and freedom of speech had become much more important since 1995. Any analogous application to new forms of journalism should be provided for in a separate sentence. DE found it difficult to see how one right could be regulated at EU level and other fundamental right at Member State level. DE also stated that regarding the relationship of the Regulation to freedom of expression and to the right of public access to official documents, it should be clearly stated which articles may be derogated from. DE is of the opinion that private communication should be completely excluded from the scope of the Regulation. If necessary, the Regulation itself should provide for exceptions to protect freedom of expression. At least a reference to press law would need to be added. EE thought article 80 needed to be reworded along the lines of Article 80a.

<sup>29</sup> IE suggestion to align the text with that of point (b) of Article 6(3).

<sup>30</sup> PL, PT and SI thought the term 'reconcile' was not very felicitous as both were fundamental rights.

<sup>31</sup> NL proposal.

<sup>32</sup> FR and IT thought that this wording was too broad and preferred the original text. IT thought a reference to the necessity test and to the Charter would need to be informed. FR also preferred having a reference to Chapter VIII, as proposed in the JURI report.

Article 80a

**Processing of personal data and public access to official documents**<sup>33</sup>

Personal data in official documents held by a public authority or a public body may be disclosed by the authority or body in accordance with Union law or Member State law to which the public authority or body is subject in order to reconcile public access to such official documents with the right to the protection of personal data pursuant to this Regulation.

Article 80b<sup>34</sup>

**Processing of national identification number**

(...) Member States may determine the **specific** conditions for the processing of a national identification number or any other identifier of general application. **The national identification number or any other identifier of general application shall be used only under**<sup>35</sup> specific and suitable measures to safeguard the rights and freedoms of the data subject.

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<sup>33</sup> SK scrutiny reservation. FR suggested to replace this article by a recital. This article, which is however very important to other delegations: SE, BE.

<sup>34</sup> DK, NL, SK and SI scrutiny reservation.

<sup>35</sup> CZ proposal.

Article 81

**Processing of personal data for health -related purposes**<sup>36</sup>

1. (...) <sup>37</sup> In accordance with point[s (g) <sup>38</sup> and]-(h) of Article 9(2), (...) personal data referred to in Article 9(1) may be processed (...) when necessary for:
- (a) the purposes of preventive or occupational medicine, medical diagnosis, the provision of care or treatment, **vocational rehabilitation**<sup>39</sup> or the management of health-care **systems and**<sup>40</sup> services, and where those data are processed by a health professional subject to the obligation of professional secrecy under Union or Member State law or rules established by national competent bodies to the obligation of professional secrecy<sup>41</sup>, **or by** another person also subject to an equivalent obligation of secrecy under Member State law or rules established by national competent bodies; or

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<sup>36</sup> NL, LV, SK and SE scrutiny reservation.

<sup>37</sup> Deleted further to DK, DE, FR and IT suggestion.

<sup>38</sup> According to DE it is not possible to evaluate whether extending the reference to include point (g) is appropriate until there has been thorough clarification of the relationship between Article 81 and the justifications listed in Article 9(2). Only then will it be possible to safely assess whether the reference to point (g) of Article 9(2) potentially weakens or undermines the requirements of point (h). IE doubted the need to refer to point (g). NL thought that any exceptions to Article 9 should be regulated there.

<sup>39</sup> DE suggestion.

<sup>40</sup> IE suggestion.

<sup>41</sup> See clarification of the term professional secrecy in recital 122. PL would have preferred to refer to legal obligations, but some of the may not be laid down in (statutory) law. RO on the contrary thought it sufficient to refer to 'rules established by national competent bodies in the field of professional secrecy'.



- (b) reasons of public interest in the area of public health established *under Union law or Member State law which provides for suitable and specific measures to safeguard the data subject's legitimate interests*<sup>42</sup>, such as **processing data for health security, monitoring and alert purposes**<sup>43</sup>, **the prevention or control of communicable diseases and other**<sup>44</sup> serious (...) <sup>45</sup> threats to health or ensuring high standards of quality and safety **of health care and services and**<sup>46</sup> **of medicinal products or medical devices or assessing public policies adopted in the field of health**<sup>47</sup>, **also by producing quality and activity indicators.**
- (c) (...)
- c) other reasons of public interest in areas such as social protection **in order to ensure that Member States can perform tasks in these areas as provided for in their respective national law**<sup>48</sup>;
- [d) the purposes of insurance and reinsurance, in particular the conclusion and performance of insurance contracts, the processing of statutory claims, the evaluation of risks, the establishment of tariffs, compliance with legal obligations and the combating of insurance fraud**<sup>49</sup>].

2. Processing of personal data concerning health which is necessary for historical, statistical or scientific (...) purposes **or for studies conducted in the public interest in the area of public health**<sup>50</sup> is subject to the conditions and safeguards referred to in Articles 83a to 83d.

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<sup>42</sup> Moved from the chapeau at the suggestion of BE.

<sup>43</sup> FR suggestion.

<sup>44</sup> DE suggestion

<sup>45</sup> Deleted in view of the remarks by DE that the limitation from Article 168(1)(2) did not apply here.

<sup>46</sup> CZ proposal.

<sup>47</sup> FR suggestion.

<sup>48</sup> DE proposal.

<sup>49</sup> DE proposal linked to an amendment to Article 9(2)(h).

<sup>50</sup> FR suggestion. At the suggestion of DE and FR the examples were deleted here, as this risks give rise to a too limited interpretation of this paragraph.

3. (...) <sup>51</sup>.

*Article 81a*

*Processing of genetic data*

- 1. Member States may provide for more specific rules or for stricter rules ensuring a higher level of protection of the rights and freedoms of the data subject on the processing of genetic data for genetic testing, in particular for medical purposes, in order to establish parentage, or in the area of insurance and worker protection, in accordance with point (h) of Article 9(2); this shall also apply to genetic data which are processed for genetic analyses carried out as part of genetic testing. Processing for scientific purposes shall be subject to the conditions and safeguards referred to in Article 83c. Member State law shall provide for specific and suitable measures to safeguard the rights and freedoms of the data subject** <sup>52</sup>
  
- 2. Each Member State shall notify to the Commission those provisions of its law which it has adopted pursuant to paragraph 1 by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment law or amendment affecting them.**

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<sup>51</sup> Deleted further to DE, ES, IE, NL, LV and RO reservation.

<sup>52</sup> Further to DE proposal. See also changes in Article 9(2)(h) and (k).

Article 82

***Processing in the employment context***<sup>53</sup>

1. (...) <sup>54</sup> Member States may **provide for more specific rules or for stricter rules ensuring a higher level of protection of the rights and freedoms in respect of** the processing of employees' personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organisation of work, **equality and diversity in the workplace**<sup>55</sup>, health and safety at work, and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.
  
- [2. Each Member State shall notify to the Commission those provisions of its law which it adopts pursuant to paragraph 1, by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them<sup>56</sup>].

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<sup>53</sup> PL reservation: there is no added value to this article. DE scrutiny reservation CZ, DE, NL and UK queried how this article (and Article 82a) related to Article 6(3) and whether this allowed Member States to adopt more stringent data protection rules. NL thought that collective agreements should also be catered for. DE stated it needed to be able to preserve its national level of employee data protection (even for cross-border data processing) and have standards which are above the European level. According to DE the content, scope and legal nature of Article 82 are not clear. A saving clause must allow Member States the necessary flexibility as regards the processing of employee data in an employment context (maintaining existing national levels of protection, flexibility as to a higher level of protection, no departure from the protection in the Regulation that would operate against data subjects' interests). It is also unclear how it relates to Article 6 (paragraph 1(f) and paragraph 3). As regards employee data protection, DE is of the opinion that there following issues are not adequately addressed in the current version of the Regulation : problems of consent to data processing, instruments laid down by collective agreement as a legal basis for data processing; Member States should be able to permit the processing of employees' personal data under collective agreements, without lowering the level of protection, surveillance (video or acoustic) at the workplace, processing of contract data, processing of corporate data, processing of health and social data.

<sup>54</sup> Deleted further to DK, DE, FR and IT suggestion.

<sup>55</sup> IE suggestion.

<sup>56</sup> BE, CZ and ES thought this paragraph could be deleted. Otherwise it might need to be moved to Chapter XI on final provision. Ro also thought paragraphs of this kind should at least be made uniform.

3. (...) <sup>57</sup>

Article 82a

**Processing for purposes of social protection**

(...)

Article 83a

**Processing of personal data for archiving purposes in the public interest** <sup>58 59</sup>

- 1. By derogation from points (b, final part) and (e) of Article 5(1) and from Article 6(3a) <sup>60</sup>, further processing of personal data for archiving purposes (...) carried out in the public interest pursuant to Union or Member State law shall not be considered incompatible with the purpose for which the data are initially collected and may be processed for those purposes for (...) longer <sup>61</sup> (...) than necessary for the initial purpose.**

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<sup>57</sup> Deleted further to DK, ES, and LV reservation.

<sup>58</sup> CZ, DE, DK, FI, FR, HU, MT, NL, PT, RO, SI, SE and UK scrutiny reservation. IT said that it was important to set out that archives must comply with the provisions in Articles 5.1 and 6. AT asked when data became archive material. PT thought that archives fulfilled its own purpose and own logic and that it was not necessary to explain why an archive existed.

<sup>59</sup> DE proposed adding: 'Establishments which are legally responsible for the documents of the secret police services of the former communist dictatorships may keep, process, publish and provide access to personal data insofar as the interests or fundamental rights and freedoms of the data subject do not outweigh the interests of processing, publishing and disclosing such documents.'

<sup>60</sup> ES said that since Articles 5 and 6 are fundamental principles it was dangerous to allow derogations from them, the conditions in Article 5 and 6 should always to complied with. ES required to see examples of such derogations.

<sup>61</sup> ES and DE indicated that no time limits should be set out for archives. PT said that it did not matter how long data were kept.

1a. **The controller shall implement** appropriate safeguards for the rights and freedoms of the data subject, in particular to ensure that the data, **without prejudice to paragraph 3,** are not processed for any other purposes or used in support of measures or decisions **affecting adversely** any particular individual<sup>62</sup>, and specifications on the conditions for access to the data<sup>63</sup>.

**2. Where personal data are processed for archiving purposes carried out by public authorities or bodies or private bodies in the public interest<sup>64</sup> pursuant to Union or Member State law, Member State law may<sup>65</sup>, subject to appropriate measures to safeguard the rights and freedoms of the data subject<sup>66</sup>, provide for derogations<sup>67</sup> from:**

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<sup>62</sup> IE meant that it would be a mistake to prohibit the use of archives in support of measures affecting people since archives could help to *e.g.* to compensate children who had been erroneously displaced or who had been victims of abuse in the past. DE meant that decisions should be allowed in favour of individuals since many uses of archives currently explicitly permitted by law and intended to address past injustices would no longer be permissible.

<sup>63</sup> In the UK opinion paragraph 2 and recital 125a were contradictory.

<sup>64</sup> DE, ES and NL asked for a definition of *public interest*, and SI expressed scepticism to define *public interest*. NL, PT and FR found that the *public interest* was too narrow. NL indicated that that archives for taxation purposes was probably not considered as public interest but could be legitimate interest and PT thought that archives were useful *per se*. DE and ES found it necessary to decide the interest of protection (DE referred to archives of Google and Facebook and ES to data kept by *e.g.* the hunting club). COM added that the archives regime would not mean that the general rules should not be complied with., but that the archive rules kicked in when the original purpose was fulfilled or no longer applicable. The justification for the archiving rules were the public interest and archiving was not a purpose in itself for COM. UK said that it would like to see a reference to private bodies since the household exemption would not cover such archives. ES and UK doubted the need for a separate article;. UK queried whether Articles 6.3 and 20 would not suffice and ES indicated that Article 21 was enough to decide if personal data were processed for public interests and if derogations could be set out. BE also asked whether it would not be enough to refer to Articles 6.3 and 21. FI wanted to know if the cultural heritage was covered by the Article on archiving and suggested to clarify it in a recital. SK wanted that archives both from the public sector as well as from the private sector be covered.

<sup>65</sup> PT and SI preferred to replace *may* with *shall*.

<sup>66</sup> FR thought that the text from "subject to ..." until "data subject" was too broad.

<sup>67</sup> IT wanted to underline that the derogations should be interpreted restrictively.

- a) Article 14a(1) and (2) where and insofar as the provision of such information proves impossible or would involve a disproportionate effort or if recording or obtaining or disclosure is expressly laid down by Union law or Member State law<sup>68</sup>;
- b) Article 16<sup>69</sup> insofar as rectification may be exercised exclusively by the provision of a supplementary statement;
- c) Articles 17, 17a and 18<sup>70</sup> insofar as such derogation is necessary<sup>71</sup> for the fulfilment for the archiving purposes.<sup>72</sup>

**3. Without prejudice to Article 80a, the controller shall take appropriate measures to ensure that personal data which are processed for the purposes referred to in paragraph 1 may be made accessible and used only for important reasons of public interest or for safeguarding the rights and freedoms of the data subject or overriding rights and freedoms of others according to Union or Member State law to which the controller is subject.**

4. (...).

5. (...).

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<sup>68</sup> IE asked why there was a reference to EU law and MS law both in the *chapeau* and in paragraph (a).

<sup>69</sup> ES expressed doubts on the reference to Article 16. IE asked why Article 16 had its own paragraph and how different that Article was to the Articles referred to in paragraph (c). IE further stated that it would be difficult to write history with the reference to Article 16 on rectification, IE therefore asked for the removal of that reference.

<sup>70</sup> DE proposed adding Article 19.

<sup>71</sup> CZ did not believe a necessity test was required.

<sup>72</sup> BE asked if the idea was that paragraph 1 related to data initially processed for archiving purposes and paragraph 2 for further processing. ES thought that there was a risk if archiving for private interests was covered by paragraph 1(c).

*Article 83b*

**Processing of personal data for statistical purposes**

- 1. By derogation from points (b) and (e) of Article 5(1) and from Article 6(3a) processing of personal data for statistical purposes carried out in the public interest pursuant to Union or Member State law shall not be considered incompatible with the purpose for which the data are initially collected and may be processed for those purposes for longer<sup>73</sup> than necessary for the initial purpose.**
  
- 1a. The controller shall implement appropriate safeguards for the rights and freedoms of the data subject, in particular to ensure that the data are not processed for any other purposes or used in support of measures or decisions affecting adversely any particular individual, and specifications on the conditions for access to the data.**
  
- 2. (...) Personal data may be processed for statistical purposes (...) in the public interest pursuant to Union or Member State law (...) provided that:**
  - (a) these purposes cannot be otherwise fulfilled by processing data which does not permit or not any longer permit the identification of the data subject;**
  - (b) data enabling the attribution of information to an identified or identifiable data subject is kept separately from the other information as long as these purposes can be fulfilled in this manner;**
  - (c) (...); and**
  - (d) that the controller provides appropriate safeguards for the rights and freedoms of the data subject individual**

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<sup>73</sup> ES and DE indicated that no time limits should be set out for archives. PT said that it did not matter how long data were kept.

3. **Where personal data are processed for statistical purposes carried out by public authorities or bodies or private bodies in the public interest<sup>74</sup> pursuant to Union or Member State law, Member State law may, subject to appropriate measures to safeguard the rights and freedoms of the data subject, provide for derogations from:**
- a) Article 14a(1) and (2) where and insofar as the provision of such information proves impossible or would involve a disproportionate effort or if recording or obtaining or disclosure is expressly laid down by Union law or Member State law;
  - b) Article (...) 16 insofar as rectification may be exercised exclusively by the provision of a supplementary statement;
  - c) Articles 17, 17a and 18 insofar as such derogation is necessary for the fulfilment for the statistical purposes (...).
4. (...).
5. (...).

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<sup>74</sup> DE, ES and NL asked for a definition of *public interest*, and SI expressed scepticism to define *public interest*. NL, PT and FR found that the *public interest* was too narrow. NL indicated that that archives for taxation purposes was probably not considered as public interest but could be legitimate interest and PT thought that archives were useful *per se*. DE and ES found it necessary to decide the interest of protection (DE referred to archives of Google and Facebook and ES to data kept by e.g. the hunting club). COM added that the archives regime would not mean that the general rules should not be complied with., but that the archive rules kicked in when the original purpose was fulfilled or no longer applicable. The justification for the archiving rules were the public interest and archiving was not a purpose in itself for COM. UK said that it would like to see a reference to private bodies since the household exemption would not cover such archives. ES and UK doubted the need for a separate article;. UK queried whether Articles 6.3 and 20 would not suffice and ES indicated that Article 21 was enough to decide if personal data were processed for public interests and if derogations could be set out. BE also asked whether it would not be enough to refer to Articles 6.3 and 21. FI wanted to know if the cultural heritage was covered by the Article on archiving and suggested to clarify it in a recital. SK wanted that archives both from the public sector as well as from the private sector be covered.



**Processing of personal data for scientific purposes**<sup>75</sup>

1. **By derogation from points (b) and (e) of Article 5(1) and from Article 6(3a), processing of personal data for scientific (...) purposes under the conditions referred to in paragraph 2 shall not be considered incompatible with the purpose for which the data are initially collected and may be processed for those purposes for longer than necessary for the initial purpose.**
  
- 1a. **The controller shall implement appropriate safeguards for the rights and freedoms of data subjects, in particular (...) that the data are not processed for any other purposes or used in support of measures or decisions affecting adversely any particular individual<sup>76</sup> and by pseudonymisation of personal data<sup>77</sup>.**

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<sup>75</sup> CZ, DK, FI, FR, MT, NL, PT, RO. SE, SI and UK scrutiny reservation. ES was sceptical and did not know if the Article was needed since there were general rules applicable. ES thought that Article 83c was not complete without include private archives UK gave the example of a historical biography of a living person and asked whether Article 80 or 83c was applicable and how these Articles were interlinked. DK suggested to add in Article 6 and 9 research as long as the conditions in Article 83c were fulfilled. BE, IE, RO, SE and UK thought that addressing both scientific and historical purposes in one Article was a bad idea. The dividing line between scientific and historical purposes and e.g. political science purpose was not clear. They use different methods; for example in scientific research the names were not important whereas the name of the person in historic research is crucial. HU thought that the title should be changed into "Purpose of documentation".

<sup>76</sup> DE meant that decisions should be allowed in favour of individuals since many uses of archives currently explicitly permitted by law and intended to address past injustices would no longer be permissible including examining the Stasi Records Act, security checks and criminal investigations. DK objected to the underlying principle in this context because of the links to clinical research and treatment.

<sup>77</sup> BE stated that in the 1995 Directive further processing fell under the general regime and suggested that this be the case here as well. NL supported DK and the need for research in the area of health for example to use personal data, NL was opposed to any restriction for such use.

2. (...) <sup>78</sup> Personal data may be processed for scientific (...) purposes, including for scientific (...) research, provided that (...) these purposes cannot **reasonably** be otherwise fulfilled **than** by processing **personal data and** (...) data enabling the attribution of information to an identified or identifiable data subject is kept separately from the other information, as long as these purposes can be fulfilled in this manner<sup>79</sup>; (...)
3. Where personal data are processed for scientific purposes, Member State law may, subject to appropriate measures to safeguard the rights and freedoms of the data subject, provide for derogations from:
- a) Article 14a(1) and (2) where and insofar as the provision of such information proves impossible or would involve a disproportionate effort<sup>80</sup> or if recording or obtaining or disclosure is expressly laid down by Union law or Member State law<sup>81</sup>;
  - b) Article 16<sup>82</sup> insofar as rectification may be exercised exclusively by the provision of a supplementary statement<sup>83</sup>;
  - c) Articles 17, 17a, and 18<sup>84</sup> insofar as such derogation is necessary for the fulfilment for the scientific purposes<sup>85</sup>.

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<sup>78</sup> DK wanted to delete "In accordance with".

<sup>79</sup> DK thought that keeping data anonymous could represent administrative burden.

<sup>80</sup> BE suggested to add "or seriously impair the achievement of the research" giving as an example that patients should not no if they were given *real* medicine or placebo medication.

<sup>81</sup> BE suggested to add "or seriously impair the achievement of the research" giving as an example that patients should not no if they were given *real* medicine or placebo medication.

<sup>82</sup> BE wanted to add a reference to Article 15. AT informed that in AT rectifications can only be made to factual data and that the data were creating negative effect on the data subject, it therefore wanted references to Article 16 to be interpreted restrictively.

<sup>83</sup> ES wanted to add more flexibility to the paragraph. NL meant that the purpose of scientific research was to publish and it should always be possible to publish albeit under certain conditions, it therefore supported the ES suggestion.

<sup>84</sup> DE proposed adding Article 19.

<sup>85</sup> BE was sceptical to this paragraph and meant that instead of harmonising the rules MS should be entitled to adopt rules.

- 3a. Personal data processed for scientific (...) purposes may be published or otherwise publicly disclosed by the controller **provided that** the interests or the rights or freedoms of the data subject do not override these interests and when:
- a. the data subject has given explicit consent<sup>86</sup>; or
  - b. the data were made manifestly public by the data subject.<sup>87</sup>;
  - c. the publication of personal data is necessary to present scientific findings<sup>88</sup>.
4. (...)

*Article 83d*

**Processing of personal data for historical purposes**

- 1. By derogation from points (b) and (e) of Article 5(1) and from Article 6(3a), processing of personal data for historical purposes (...) shall not be considered incompatible with the purpose for which the data are initially collected and may be processed for those purposes for longer than necessary for the initial purpose.**

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<sup>86</sup> DE wanted that consent should not be required for research on health aspects and the use of bio-banks. Support from DK that said that there are health legislation and ethics in science and consent from the relevant authorities should be enough. DK said that studies from the US showed that it was impossible to receive the consent of a large number of persons in order to do research, for deceases like cancer and infectious deceases it was important to use personal data. Support from SE and UK on consent.

<sup>87</sup> BE said that paragraph 2 could not be used for historical purposes.

<sup>88</sup> HU requested the reinsertion of paragraph (c) on publication or public disclosure. DE queried whether the publication of personal data in the form of individual statistics if the data subject gives consent is possible under Article 83c(2) or not at all.

- 1a. The controller shall implement appropriate safeguards for the rights and freedoms of data subjects, in particular (...) that the data are not processed for any other purposes or used in support of measures or decisions adversely affecting any particular individual<sup>89</sup> (...) <sup>90</sup> :**
- 2. Where personal data are processed for historical purposes, Member State law may, subject to appropriate measures to safeguard the rights and freedoms of the data subject, provide for derogations from:**
- a) Article 14a(1) and (2) where and insofar as the provision of such information proves impossible or would involve a disproportionate effort or if recording or obtaining or disclosure is expressly laid down by Union law or Member State law;**
  - b) Article 16<sup>91</sup> insofar as rectification may be exercised exclusively by the provision of a supplementary statement;**
  - c) Articles 17, 17a, and 18<sup>92</sup> insofar as such derogation is necessary for the fulfilment for the historical purposes.**
- 3. Personal data processed for historical purposes may be published or otherwise publicly disclosed by the controller provided that the interests or the rights or freedoms of the data subject do not override these interests and when:**
- (a) the data subject has given explicit consent; or**

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<sup>89</sup> DE thought that decisions should be allowed in favour of individuals since many uses of archives currently explicitly permitted by law and intended to address past injustices would no longer be permissible including examining the Stasi Records Act, security checks and criminal investigations.

<sup>90</sup> PL suggested to add the following text: "When data are being processed for historical or archival purposes, the data subject shall have the right to obtain completion of incomplete or out of date personal data by means of providing a supplementary statement."

<sup>91</sup> BE wanted to add a reference to Article 15. AT informed that in AT rectifications can only be made to factual data and that the data were creating negative effect on the data subject, it therefore wanted references to Article 16 to be interpreted restrictively.

<sup>92</sup> BE suggested to add a reference to Article 19 as well.

**(b) the data were made manifestly public by the data subject; or**

**(c) the publication or other public disclosure is necessary to present historical findings.**

*Article 84*

***Obligations of secrecy***<sup>93</sup>

1. (...), Member States may adopt specific rules to set out the (...) <sup>94</sup> powers by the supervisory authorities laid down in Article 53(...) in relation to controllers or processors that are subjects under national law or rules established by national competent bodies to an obligation of professional secrecy or other equivalent obligations of secrecy **and/or to a code of professional ethics supervised and enforced by professional bodies**, where this is necessary and proportionate to reconcile the right of the protection of personal data with the obligation of secrecy. These rules shall only apply with regard to personal data which the controller or processor has received from or has obtained in an activity covered by this obligation of secrecy<sup>95</sup>.
2. Each Member State shall notify to the Commission the rules adopted pursuant to paragraph 1, by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them<sup>96</sup>.

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<sup>93</sup> DE, ES, IT, NL and UK scrutiny reservation.

<sup>94</sup> BE and DE suggestion to cover all powers set out in Article 53.

<sup>95</sup> BE suggested adding a new paragraph: "The supervisory authority will consult the relevant independent professional body prior to taking a decision on data flows".

<sup>96</sup> CZ reservation. RO remarked that a uniform approach should be established for this type of provision, which might need to be moved to Chapter XI on final provisions.

Article 85

*Existing data protection rules of churches and religious associations*<sup>97</sup>

1. Where in a Member State, churches and religious associations or communities apply, at the time of entry into force of this Regulation, comprehensive rules<sup>98</sup> relating to the protection of individuals with regard to the processing of personal data, such rules may continue to apply, provided that they are brought in line with the provisions of this Regulation<sup>99</sup>.
2. Churches and religious associations which apply comprehensive rules in accordance with paragraph 1, shall **be subject to the control of an independent supervisory authority which may be specific, provided that it fulfils the conditions laid down**<sup>100</sup> in Chapter VI of this Regulation.

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<sup>97</sup> NL and PT reservation.

<sup>98</sup> IT thought the concept of 'comprehensive rules' needed to be clarified.

<sup>99</sup> DE proposed the following alternative wording: 'Member States may make provision, on the basis of the right to self-determination guaranteed in Member State law, for churches or religious associations or communities to adopt and apply independent and comprehensive rules which guarantee a level of data protection equivalent to that set by this Regulation for the protection of natural persons during the processing of personal data'.

<sup>100</sup> Further to DE proposal.