Council of the European Union

Brussels, 16 November 2015
(OR. en)

13914/15

Interinstitutional File:
2012/0011 (COD)

LIMITE

DATAPROTECT 197
JAI 848
MI 707
DIGIT 89
DAPIX 206
FREMP 257
COMIX 569
CODEC 1493

NOTE

From:	Presidency
To:	Permanent Representatives Committee
No. prev. doc.:	10391/15, 14076/15
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) (first reading) - Preparation of trilogue - Chapters II, III, IV and V

INTRODUCTION

1. The Commission proposed on 25 January 2012 a comprehensive data protection package comprising of:
   - abovementioned proposal for a General Data Protection Regulation, which is intended to replace the 1995 Data Protection Directive (former first pillar);
   - a proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, which is intended to replace the 2008 Data Protection Framework Decision (former third pillar).

2. The aim of the General Data Protection Regulation is to reinforce data protection rights of individuals, facilitate the free flow of personal data in the digital single market and reduce administrative burden.

3. The European Parliament adopted its first reading on the proposed General Data Protection Regulation and Directive on 12th March 2014.

4. The Council agreed on a General Approach (9565/15) on the General Data Protection Regulation on 15th June 2015, thereby giving to the Presidency a negotiating mandate to enter into trilogues with the European Parliament. The Luxembourg Presidency considers the works on the General Data Protection Regulation as one of its main priorities.

5. In the context of the European Council's objective to conclude the reform by the end of the year, the Presidency submits for examination with a view to confirmation to the Permanent Representatives Committee compromise suggestions on the main outstanding issues relating to Chapters II, III, IV and V of the draft General Data Protection Regulation. On the basis of the outcome of this examination, the Presidency will engage in trilogue with the European Parliament with the aim to find an early second reading agreement.

6. These Chapters have been examined intensively by experts and JHA Counsellors when preparing the seven trilogues with the European Parliament that have taken place since June 2015 on all the Chapters of the General Data Protection Regulation. The Presidency sought the views of delegations on possible compromise solutions both before and after each trilogue. Delegations have also been debriefed on all the Chapters of the Regulation discussed in trilogue.

   Taking into account the overall balance of these Chapters and recalling that nothing is agreed until everything is agreed, the Presidency invites delegations to show flexibility on the compromise suggestions proposed below, including aligned recitals.

7. Delegations will find in document 14076/15 a comparative table which compares in 4 columns the Commission proposal, the position of the European Parliament in 1st reading, the Council's General Approach and compromises tentatively agreed at previous trilogues as well as compromise suggestions by the Presidency. Text marked in brackets will be discussed by the Permanent Representatives Committee at a later stage in relation to other provisions of the text. This is in particular the case with provisions relating to data that are processed for archiving purposes in the public interest, or for historical, statistical or scientific purposes.

PRESIDENCY COMPROMISE SUGGESTIONS

The Presidency invites the Permanent Representatives Committee to focus the discussion on the following main outstanding issues where further input is needed.

Consent – Article 4(8), Article 6(1(a)), Article 7, Article 9

8. The Council's General Approach maintains the same approach as taken by Directive 95/46/EC as regards consent: for the processing of personal data, such consent should be given unambiguously while for the processing of sensitive personal data, an explicit consent by the data subject should be required. The European Parliament foresees explicit consent for processing of both categories of personal data. The Presidency suggests to maintain the General Approach in this regard, while remaining flexible on the European Parliament's Article 7(2) and (4) relating to the tying of consent to the processing of data not necessary for the service consented to. For Article 7(2), the Presidency proposes the following wording:

> *2. If the data subject's consent is given in the context of a written declaration which also concerns other matters, the requirement for consent must be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of the declaration which constitutes an infringement of this Regulation that the data subject has given consent to shall not be binding.*

For Article 7(4), the Presidency proposes the following wording, possibly subject to redrafting:

> *4. When assessing whether consent is freely given, account shall be taken of the fact whether, among others, the performance of a contract, including the provision of a service, is made conditional on the consent to the processing of data that is not necessary for the performance of this contract, where processing is based on Article 6(1)(b).*

Purpose limitation – Article 5(1(c)), Article 6(3a), Article 6(4)

9. Following its mandate, the Presidency proposes to refer to the data minimisation principle in Article 5(1(c)) as follows: "*limited to what is necessary*", as indicated in the 4th column.

As regards Article 6(3a) on the compatibility test and Article 6(4) on further processing for purposes that are incompatible with the purpose for which personal data were initially collected, which encountered strong opposition by the European Parliament, the Presidency proposes a compromise suggestion in Article 6(3a). Article 6(4) would be deleted as a consequence. The chapeau of Article 6(3a) with an additional reference to Union or Member State law would read as follows:

> *3a. Where the processing for another purpose than the one for which the data have been collected is not based on the data subject's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in points (aa) to (g) of Article 21(1), the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the data are initially collected, take into account, inter alia:*
>
> *(a) any link between the purposes for which the data have been collected and the purposes of the intended further processing;*
>
> *(b) the context in which the data have been collected, in particular regarding the relationship between data subjects and the controller;*

(c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9 or whether data related to criminal convictions and offences are processed, pursuant to Article 9a;

(d) the possible consequences of the intended further processing for data subjects;

(e) the existence of appropriate safeguards.

Sensitive data – Article 9

10. The European Parliament proposes to include in the list of sensitive data whose processing is in principle prohibited a reference to biometric data. The modernised Convention 108 of the Council of Europe defines biometric data that uniquely identify a person to qualify as sensitive data. In the Council's General Approach, the reference to biometric data is seen as an element to take into account when making a data protection impact assessment. The Presidency considers that this is already an indication that biometric data could be an element of risk depending on the context. The Presidency proposes to stick to the Council's General Approach in this respect for the time being.

    The Presidency also considers that Article 9(5) on the possibility for Member States to maintain or introduce more specific provisions with regard to genetic data or health data is already covered by Article 6(3), which is therefore redundant.

Icons – Article 12, Article 13a EP

11. In order to enhance awareness and facilitate the information to the data subject, the European Parliament proposes standardised icons to be used mandatorily by controllers. The Presidency proposes to consider the voluntary use of such icons by introducing the following wording in Article 12, subject to agreement on Articles 14 and 14a:

    4b. The information to be provided to data subjects pursuant to Articles 14 and 14a may be provided by, amongst others or in combination with, standardised icons in order to give in an easily visible, intelligible and clearly legible way a meaningful overview of the intended processing. Where the icons are presented electronically they shall be machine-readable.

4c. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of determining the information to be presented by the icons and the procedures for providing standardised icons.

Information to the data subject – Article 14, Article 14a

12. The European Parliament remains sceptical when it comes to the two-step structure in both Articles 14 and 14a relating to the information to be provided to the data subject and prefers to have the information in Article 14(1a) and Article 14a(2) to be provided in all cases, "if applicable". The Presidency proposes to reformulate the chapeau of the second step (Article 14(1a) and Article 14a(2)) as follows: "*In addition to the information referred to in paragraph 1, the controller shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing.*" The Presidency also considers that the following information could be moved to Articles 14(1) and 14a(1) respectively: information about, "*where applicable, the recipients or categories of recipients of the personal data*" and information about, "*where applicable, that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in case of transfers referred to in Article 42 or 43, or point (h) of Article 44(1), reference to the appropriate or suitable safeguards and the means to obtain a copy of them or where they have been made available*."

Right to be forgotten – Article 17

13. The European Parliament insists on a limited delegation of power to the Commission in Article 17(9) concerning only the procedures for deleting links, copies or replications of personal data from publicly available communication services (point (b)). Bearing in mind that the European Parliament could accept the Council's General Approach as regards the right to be forgotten in Article 17(2a) relating to the information by controllers to subsequent controllers about a data subject's request to erase any links to, or copy or replication of his/her personal data, the Presidency suggests to accept, in this particular case, the introduction of a delegated act with a limited scope. The following wording is suggested:

> *9. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the procedures for deleting links, copies or replications of personal data from publicly available communication services as referred to in paragraph 2.*

Right to object and profiling – Article 19, Article 20

14. The European Parliament strongly advocates an explicit reference to a right to object to profiling, which the Presidency proposes to integrate in Article 19(1) if profiling is based on Articles 6(1(e)) relating to the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or (f) relating to the legitimate interest of a controller.

    As regards automated individual decision making, including profiling, the Presidency proposes to largely stick to the Council's General Approach while integrating, in Article 20(1), the following qualification retained by the European Parliament in a spirit of compromise: "*which produces legal effects concerning him or her or similarly significantly affects him or her*."

15. The European Parliament insists on referring, in the operational part of the text, to the possibility for the data subject to exercise his or her right to object by using technical specifications in the context of information society services, which is to be understood as online do-not-track features. The Presidency suggests to accept this idea reformulated as follows: "*In the context of the use of information society services, and notwithstanding Directive 2002/58/EC, the data subject may exercise his or her right to object by automated means using technical specifications*."

Data breaches – Article 31, Article 32

16. In relation to personal data breaches, the European Parliament insists on a lower threshold as contained in the Council's General Approach in Article 31(1) concerning notification to supervisory authorities. At the same time, the European Parliament could accept a higher threshold than in its own text for notifying data breaches to the supervisory authority (referring to simple "risk") while keeping the Council's threshold for Article 32 which relates to communication of data breaches to the data subject, in addition to an obligation for controllers to document all data breaches, if Council can show flexibility as regards the mandatory appointment of the Data Protection Officer. For reasons of visibility, and in line with the accountability principle, the European Parliament could accept a reversed formulation as follows:

> *1. In the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the supervisory authority competent in accordance with Article 51, unless the controller is able to demonstrate that the personal data breach is unlikely to result in a risk for the rights and freedoms of individuals. The notification to the supervisory authority shall be accompanied by a reasoned justification in cases where it is not made within 72 hours.*

Data Protection Officer – Article 35

17. The European Parliament insists on a mandatory Data Protection Officer to be appointed in certain cases. The Presidency, having continuously argued against an obligation and defended a voluntary appointment of the Data Protection Officer, considers that flexibility on behalf of Council in this respect could significantly help negotiations move forward. Therefore, the Presidency suggests to consider the avenues proposed by the European Parliament to have a mandatory Data Protection Officer in strictly limited cases: public authorities, controllers whose core activities consist of processing operations which require regular and systematic monitoring of the data subjects, and controllers whose core activities consist of processing sensitive data on a large scale. Given that this would be a major concession from Council, the Presidency argues to stick to the Council's General Approach when it comes to flexibility clauses relating to the public sector (Article 6(3)).
    The European Parliament wishes to use the same criteria for data protection impact assessment in Article 33, with the exception of the reference to public authorities. In this respect, the Presidency proposes to maintain the Council's General Approach as regards Article 33(2(a)) relating to a systematic and extensive evaluation of personal aspects, Article 33(2(b)) relating to the processing of sensitive data, and Article 33(2(c)) relating to systematic monitoring of a publicly accessible area on a large scale, which cover the criteria requested by the European Parliament.

European Data Protection Seal – Article 39

18. The European Parliament insists on introducing a European Data Protection Seal issued on the basis of criteria developed by the European Data Protection Board, as one possibility in addition to other certifications, seals or marks. This is already foreseen in Article 39(2a) which the Presidency proposes to complete by adding a sentence to meet the European Parliament's request: "*In the latter case, the criteria approved by the European Data Protection Board may result in a common certification, the European Data Protection Seal*."

International transfers – Article 40, Article 41, Article 42

19. Following the judgment of the Court of Justice of the European Union on case C-362/14. ("Schrems case") of 6 October 2015, the European Parliament wishes to complete Chapter V which had been previously tentatively agreed. The Presidency considers there is no justification to rediscuss Chapter V. This is why, if Council decides to consider some of the elements put forward by the European Parliament, the Presidency will insist, in turn, on flexibility from the European Parliament, for instance on provisions relating to flexibility for the public sector. The following elements regarding Chapter V are put forward for consideration by delegations:
    - A general clause in Article 40 about the need, for instance, to respect data protection principles or a high level of protection when data are transferred to a third country or international organisations;
    - The reintroduction, in Article 41(2(a)), of the terms "*including concerning public security, defence, national security and criminal law*" given that this reference is already included in recital (81) of the Council's General Approach;
    - A reconfirmation of enforceable data subject rights and effective legal remedies for data subjects in Article 42(1), which is already included in recital (83) of the Council's General Approach;
    - A clarification, in recital (81), that "*adequate*" means "*essentially equivalent*".

Other issues

20. On the following issues, the Presidency proposals relate either to minor modifications in order to simplify wording, to align with tentatively agreed provisions elsewhere in the Regulation or that are based on a previously obtained negotiation mandate:
    - Recitals 26, 37, 38, 39, 40, 46, 47, 48, 51, 55, 57, 58, 60, 61, 66, 67, 73, 74, 75
    - Article 8
    - Article 9(2(g))
    - Article 9a
    - Article 12(1a)
    - Article 14(1b)

- Article 14a(3a), (4(b)), (4(d))
- Article 17(3(c)), (d)
- Article 18(2a)
- Article 26(2(h)), (4)
- Article 28(4(b))
- Article 39a(1)
- Article 43(2(g))

Conclusion

21. In view of the next trilogues with the European Parliament on 24 November 2015 and 10 December 2015, the Presidency invites the Permanent Representatives Committee to examine these issues with a view to confirmation of the Presidency compromise suggestions and give a mandate to the Presidency to continue negotiations with the European Parliament on this basis with the aim to find agreement on the General Data Protection Regulation by the end of this year.