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From:	Presidency
To:	Permanent Representatives Committee
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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) [First reading] - Presidency debriefing on the outcome of the trilogue - Preparation for trilogue - Chapters I, VI, VII, VIII, IX, X and XI

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 I, VI, VII, VIII, IX, X and XI 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 14319/15 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 separately. This is in particular the case with provisions relating to the scope of the 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.

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.

Union institutions, bodies, offices and bodies – Article 2(2a)

8. The Council's General Approach maintains the approach proposed by the Commission in excluding Union institutions, bodies, offices and agencies from the material scope of the Regulation, since specific rules are in place for these situations (Regulation 45/2001). Given that the European Parliament includes the Union institutions, bodies, offices and agencies in the material scope of the Regulation, the Presidency proposes the following compromise in Article 2, and adapting the relevant recital (14a):

> *2a. For the processing of personal data by the Union institutions,bodies, offices and agencies, Regulation (EC) No 45/2001 applies. Regulation (EC) No 45/2001 and other Union legal instruments applicable to such processing of personal data shall be adapted to the principles and rules of this Regulation in accordance with Article 90a.*

Such a provision is completed by a new Article 90a inviting the Commission to submit, if appropriate, legislative proposals with a view to aligning other EU legal instruments such as Regulation 45/2001 applicable to Union institution, bodies, offices and agencies:

> *The Commission shall, if appropriate, submit legislative proposals with a view to amending other EU legal instruments on the protection of personal data, in order to ensure uniform and consistent protection of individuals with regard to the processing of personal data.*
>
> *This shall in particular concern the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies and on the free movement of such data.*

Flexibility for adapting the application of the rules –Article 6(2a) (new)

9. In relation to Article 1(2a) which allows Member States to maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to the processing of personal data for compliance with Article 6(1(c)) and (e), the European Parliament understands the importance of this paragraph for Member States. For the European Parliament, this refers to a possibility for Member States to specify the conditions of processing based on these grounds in Article 6 and, as a consequence, the European Parliament insists on replacing the term "adapt" by "further specify" and delete the reference to the "application of" rules of the Regulation. The Presidency suggests to maintain the General Approach as regards the wording but to move it from Article 1 to Article 6 as follows:

> *2a. (new) Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to Article 6(1)(c) and (e) by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX.*

10. In relation to Article 6(3), the Presidency proposes to complete the chapeau indicating that "*the basis for the processing referred to in point (c) and (e) of paragraph 1 must be laid down by*" with the following addition in recital (36) in order to clarify that no individual legal basis is needed for each processing:

> "*No specific law is necessary for each individual processing. A general law as a basis for several processing operations based on but that it may be general law as a basis for several processings based on 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 may be sufficient*."

Restrictions – Article 21(2)

11. In Article 21(2), the European Parliament insists that a legislative measure restricting certain obligations and rights should contain the right for data subjects to be informed about such a restriction. Since the wording proposed by the European Parliament is not acceptable for Council, the Presidency suggests to reformulate as follows:

> "*the right for data subjects to have a general indication about the restriction, unless this may be prejudicial to the purpose of the restriction*."

General conditions for the members of the supervisory authority –Article 48(4) and (5)

12. The European Parliament insists on having Article 48(4) and (5) in the operative part of the text. Article 48(4) concerns rules on dismissal of the members of the supervisory authority and on other rights or benefits. According to Article 48(5), deleted in the Council's General Approach, members of the supervisory authority who have resigned are foreseen to continue the exercise of their duties until a new member is appointed. In a spirit of compromise, the Presidency suggests accepting only the re-introduction of Article 48(4) with a slight reformulation referring to national law:

4. A member may be dismissed or deprived of the right to a pension or other benefits in its stead by the competent national court, in accordance with national law, if the member no longer fulfils the conditions required for the performance of the duties.

The Presidency proposes to insist on the deletion of Article 48(5).

Confidential Reporting – Article 49(2), Article 53(1(ja) EP and Article 66(4) EP

13. The European Parliament proposes in its Article 53(1(ja)) an obligation for supervisory authorities to "*put in place effective mechanisms to encourage confidential reporting of breaches of this Regulation, taking into account guidance issued by the European Data Protection Board pursuant to Article 66(4b)"*. This has to be read together with Article 66(4b) where the European Parliament provides that "*the European Data Protection Board shall be entrusted with the task of issuing guidelines, recommendations and best practices* […] *for establishing common procedures for receiving and investigating information concerning allegations of unlawful processing and for safeguarding confidentiality and sources of information received*". A similar idea is included in the European Parliament's Article 52(1(d)). The Presidency suggests to cover confidential reporting in Article 49(2) in the context of the obligations of professional secrecy and confidentiality for members of the supervisory authority. The Presidency proposes to add the following sentence:

2. The member or members and the staff of each supervisory authority shall, in accordance with Union or Member State law, be subject to a duty of professional secrecy both during and after their term of office, with regard to any confidential information which has come to their knowledge in the course of the performance of their duties or exercise of their powers. <u>During their term of office, this duty of professional secrecy shall in particular apply to reporting of infringements of this Regulation</u>.

Powers of the supervisory authorities– Article 53 (1), (1b), (1c) and (3)

14. In Article 53(1) chapeau, (1b) chapeau, (1c) chapeau and (3), the European Parliament rejects that Member States shall provide the powers of supervisory authorities by law, and insists to have the powers of the supervisory authorities directly defined in the Regulation for harmonisation purposes. Therefore, the European Parliament seeks the deletion of the terms "*Member State shall provide by law*" and "*at least*" in these paragraphs. The Presidency proposes, in a spirit of compromise, and reminding delegations that Member States may, as mentioned in recital (6a) and as far necessary, incorporate those provisions in their national law, to formulate the respective provision as follows in Article 53(1), (1b) and (1c):

> "*Each supervisory authority shall have at least the following* [investigative / corrective / advisory] *powers*"

As far Article 53(3) are concerned, the Presidency proposes to maintain the reference to Member States providing by law that its supervisory authority shall have the power to bring infringements of this Regulation to the attention of the judicial authorities.

Voting rights of the European Data Protection Supervisor – Article 64(4) and (5new)

15. The Council's General Approach foresees in Article 64(4) that the "*Commission and the European Data Protection Supervisor shall have the right to participate in activities and meetings of the European Data Protection Board without voting right*". The European Parliament insists on having a voting right for the European Data Protection Supervisor. In a spirit of compromise, the Presidency suggests to add a limited voting right in the cases covered by decisions pursuant to Article 58a as far as these cases concern principles and rules applicable to the Union institutions, bodies, offices, and agencies which are identical to those of this Regulation. Given that such a voting right would only cover principles and rules that also apply to the Union institutions, bodies, offices, and agencies, the Presidency considers there is no link in substance to the material scope.

5(new). In cases related to Article 58a, the EDPS shall have voting rights only on decisions which concern principles and rules applicable to the Union institutions, bodies, offices, and agencies which are identical to those of this Regulation.

Right to be forgotten – Article 17, Article 66

16. Following discussions at the Permanent Representatives Committee meeting of 19th November 2015 indicating a rejection by delegations of a delegated act in relation to the right to be forgotten in Article 17(9), the Presidency proposes as a compromise solution in Article 66(1(ab) (new) to task the European Data Protection Board to issue opinions on "*procedures for deleting links, copies or replications of personal data from publicly available communication services*".

Representation of data subjects – Article 76

17. In Article 76(1) and (2), the European Parliament insists on adding a reference to Article 77 which would allow for bodies, organisations or associations to ask for compensation on behalf of data subjects. The Presidency suggests to consider such a reference only in Article 76(1) as far as national legal systems provide for compensation to be asked on behalf of the data subject.

    In addition, the Presidency proposes to further frame the notion of the bodies, organisations or associations that would be able to act, by referring to their non-profit making character and to their public interest objectives as an addition to the protection of personal data. The wording proposed reads as follows:

1. *The data subject shall have the right to mandate a body, organisation or association, which has been properly constituted according to the law of a Member State, which is of non-profit making character, and whose statutory objectives are in the public interest and include the protection of data subject's rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf and to exercise the rights referred to in Articles 73, 74 and 75 on his or her behalf, and to exercise the right to receive compensation referred to in Article 77 on his or her behalf if provided for by Member State law.*

Liability – Article 77

18. When it comes to exemption from liability, the European Parliament insists on having a "may" instead of a "shall" in Article 77(3) in order to avoid the situation where a data subject might not receive compensation. In exchange the European Parliament would be ready to accept the deletion of any reference to "*jointly and severally liable*" in Article 77 and accept the Council's General Approach. The Presidency proposes to stick to a "shall"-provision in Article 77(3) while adding a double condition when the exemption to liability would not apply in order to meet concerns of the European Parliament. This double condition would cover only the cases that fall in Article 77(4), ie where there are more than one controller or processor involved in the same processing, and one of these controllers or processors, if they are responsible for the event giving rise to the damage, has factually disappeared or ceased to exist in law or have become insolvent. This latter criterion is a known concept taken from the standard contractual clauses. The following reformulation is proposed:

3. A controller or processor shall be exempted from liability in accordance with paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage, except in cases referred to in paragraph 4 where one or more of the other controllers or processors responsible for the event giving rise to the damage have factually disappeared or ceased to exist in law or have become insolvent.

Notification obligation for Member States – Articles 80, 80a, 80b

19. The European Parliament insists on provision obliging Member States to notify to the Commission those provisions of its law which is had adopted pursuant to Article 80(1), Article 80a and Article 80b by the date of entry into force of the Regulation at the latest. While the Presidency has resisted such insertions, a compromise solution is suggested in the context of Article 90 relating to the evaluation and review of this Regulation by the Commission. The following wording is proposed in Article 90(2a):

> *2a. For the purpose referred to in paragraphs 1 and 2, the Commission may request information from Member States and supervisory authorities, in particular as regards Articles 80(1), 80a and 80b*.

Article 83 – Derogations applying to processing of personal data for archiving purposes in the public interest or for scientific, statistical and historical purposes

20. As regards Article 83, the European Parliament insists on introducing safeguards for all processing for scientific, statistical and historic research purposes, and for archiving purposes, and rejects the possibility of derogations as foreseen in Article 83(1) and (1a) in the Council's General Approach. The European Parliament does not insist on a mandatory provision which types of safeguards have to be in place. The Presidency considers that there is flexibility in Council to accept that safeguards have to be in place for processing for archiving purposes in the public interest, and for scientific, statistical and historical purposes, in particular considering the central character of the references to Article 83 elsewhere in the Regulation – Article 5(1(b)) and (e), Article 6(2), Article 9(2(i)), Article 14a(4(b)) and Article 17(3(d)). Taking into account Article 8 of the EU Charter of Fundamental Rights, delegations are invited to reflect on the necessity of referring to all the derogations in Article 83. Considering that Articles 14a, 17 and 19(2aa) already contain such derogations, and considering that Article 21 already allows Member States to restrict all Articles listed for an important objective of general public interest, the Presidency proposes to reformulate Article 83 as follows:

1. Personal data may be processed for scientific, statistical or historical purposes, or for archiving purposes in the public interest, subject to appropriate safeguards for the rights and freedoms of the data subject.

1a (new). The appropriate safeguards referred to in paragraph 1 shall be laid down in Union or Member State law and shall be such as to ensure that technological and/or organisational measures pursuant to this Regulation are applied to the personal data concerned in order to minimise the processing in compliance with the proportionality and necessity principles. Such measures may consist of, inter alia, at least:

(a) processing data which does not permit or not any longer permit the identification of the data subject, such as pseudonymisation or anonymisation, unless this would prevent achieving the purpose of the processing and such purposes cannot be otherwise fulfilled within reasonable means;

(b) keeping the data enabling the attribution of information to an identified or identifiable data subject separately from the other information as long as these purposes can be fulfilled in this manner.

1b. (new). Where personal data are processed for scientific, statistical or historical purposes, Union or Member State law may subject to appropriate safeguards for the rights and freedoms of the data subject, provide for derogations from Articles 17a, 17b and 18, insofar as such derogation is necessary for the fulfilment of the specific purposes.

1c (new). Where personal data are processed for archiving purposes in the public interest, Union or Member State law may, subject to appropriate safeguards for the rights and freedoms of the data subject, provide for derogations from Articles 17a, 17b, 18, 23, 32 and 33, insofar as such derogation is necessary for the fulfilment of these purposes.

1d. Where processing referred to in paragraph 1 serves at the same time another purpose, the derogations referred to in paragraphs 1b (new) and 1c (new) apply only to the processing for the purposes referred to in paragraph 1.

Other issues

21. 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 (3), (11), (15), (16), (23), (24), (24c) new, (59), (94), (95), (103), (104), (108), (110), (110a), (111), (112), (120a) new, (121), (121a), (125), (125b), (134)
    - Article 4(7)
    - Article 21(1), (1(e))
    - Article 47(4), (5)
    - Article 48(1)
    - Article 52(2(jb)), (6)
    - Article 56(1), (3a)
    - Article 66
    - Article 73(1)
    - Article 74(2)
    - Article 79(3b), (5)
    - Article 86
    - Article 88(1)

Conclusion

22. In view of the next trilogues with the European Parliament, in particular on 10th December 2015, the Presidency invites the Permanent Representatives Committee to examine 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.