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From:	Presidency
To:	Delegations
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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) - Technical follow-up to COREPERs of 19 and 26 November

1. On 26th November 2015, the Presidency submitted 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.
2. The intention of the Presidency is to make a technical follow up of this meeting in order to find compromise solutions in particular on the issues mentioned below. As already indicated, the present cover note completes document 14461/15 in order to take account of the latest discussions at COREPER level.

Chapters VI-VII

3. As regards Article 48(4) concerning rules on dismissal of the members of the supervisory authority and on pensions rights or other benefits, the Presidency noted reluctance from Member States on the wording of the provision which is perceived as too prescriptive. In order to find a compromise with the European Parliament, the Presidency suggests to further refine this provision as follows:

A member may be dismissed or deprived of benefits by the competent national court, when provided for by national law, if the member no longer fulfils the conditions required for the performance of the duties or is guilty of serious misconduct.

Chapter VIII

4. 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) and to complete Article 77(4) by further elaborating on the exercise of the right to compensation in order to meet concerns of the European Parliament. 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. In cases referred to in paragraph 4 and where one or more of the other controllers or processors have factually disappeared or ceased to exist in law or have become insolvent, a controller or processor may be exempted from liability.

4. Where more than one controller or processor or a controller and a processor are involved in the same processing and, where they are, in accordance with paragraphs 2 and 3, responsible for any damage caused by the processing, each controller or processor shall be held liable by a court for the entire compensation to the data subject for the entire damage.

5. As regards Article 79 on administrative fines, and for reasons of legal certainty, the Presidency understood the request by Member States to keep categories listing the infringements which are to be sanctioned by fines. Each category defines a maximum level of fines for the individual infringements listed exhaustively in the relevant category. The European Parliament expressed concern about the possible provisions not listed in any of the categories, which may then not be subject to possible administrative fines. In order to meet this concern, the Presidency proposes to reformulate paragraph 3aa (new) as follows:

(3aa) (new). Each supervisory authority may impose administrative fines up to 1 000 000 EUR, or in case of an undertaking, up to 2% of the total worldwide annual turnover of the preceding financial year, whichever is higher, for non-compliance with an order by the supervisory authority as referred to in Article 53(1b(d)).

Chapter IX

6. Following discussions in COREPER, the Presidency proposes a comprehensive analysis of all provisions related to the processing of personal data for archiving purposes in the public interest or for scientific, historical or statistical purposes. These purposes are referred to in Article 5(1(b)), Article 6(2), Article 9(2(i)) as well as Article 14a(4(b)) and Article 17(3(d)). These Articles all refer to Article 83 which is to provide the necessary conditions and safeguards for the processing of personal data for such purposes.

The Presidency proposes therefore to maintain the Council's General Approach on all these Articles, and to focus on Article 83 in order to find a compromise with the European Parliament.

The Presidency understood from COREPER 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, historical or statistical purposes. Delegations are reminded that it is for the controller to evaluate whether the purposes cannot be otherwise fulfilled within reasonable means. Some of the derogations listed in Article 83 of the Council's General Approach, notably Articles 14a, 17 and 19, are already contained directly in these Articles. For the remaining derogations, notably Articles 15, 16, 17a, 17b and 18, the Presidency indicates that Article 21 allows Member States to restrict these rights for important objectives of general public interests.

An avenue, which was raised during COREPER, concerns the proposal to differentiate the derogations depending on the purpose of the processing. The same derogations do not necessarily need to apply indistinctly to all processing for archiving purposes in the public interest, for scientific, historical or statistical purposes.

The Presidency proposes to discuss on the basis of the following suggestion:

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

1a (new). Where personal data are processed for scientific and statistical purposes, the appropriate safeguards referred to in paragraph 1 shall cover processing data which does not permit or not any longer permit the identification of the data subject, such as pseudonymisation, unless this would prevent achieving the purpose of the processing and such purposes cannot be otherwise fulfilled within reasonable means.

1b (new). Where personal data are processed for historical purposes, or for archiving purposes in the public interest, the appropriate safeguards referred to in paragraph 1 shall be laid down in Union or Member State law.

2 (new). Where personal data are processed for scientific or statistical 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 [16, 17a and 17b], insofar as such derogation is necessary for the fulfilment of the specific purposes.

2a (new). Where personal data are processed for historical purposes, or 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 [15, 16, 17a, 17b, 18], insofar as such derogation is necessary for the fulfilment of these purposes.

3 (new). In case a type of processing referred to in paragraphs 2 (new) or 2a (new) serves at the same time another purpose, the derogations allowed for apply only to the processing for the purposes referred to in those paragraphs.

7. In this context, a compromise will need to be struck with the European Parliament on the processing of personal data for these purposes. The Presidency proposes the following:
- processing of personal data for archiving purposes in the public interest;
 - processing of personal data for scientific research purposes;
 - processing of personal data for historical and statistical purposes. Possibly, for these two purposes, a clarification could be provided in a recital that these purposes should serve a “general interest”.

Delegations are invited to comment on these options and provide further elements for consideration.