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NOTE

From: Presidency

To: Permanent Representatives Committee

No. prev. doc.: 14318/15, 13914/15

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)

- Preparation for trilogue

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 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 all the Chapters of the draft General Data Protection Regulation. On the basis of the outcome of this examination, the Presidency is engaged in trilogue with the European Parliament with the aim to find an early second reading agreement.
6. All the Chapters have been examined intensively by experts and JHA Counsellors when preparing the eight 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. Outstanding issues relating to the whole General Data Protection Regulation have also been analysed by the Permanent Representatives Committee on 19th and 26th of November 2015. A technical follow-up to these discussions took place at JHA Counsellors level on 30th November 2015.

Taking into account the overall balance of this Regulation and recalling that nothing is agreed until everything is agreed, the Presidency invites delegations to confirm the compromise suggestions proposed below, including aligned recitals.

7. Delegations will find in document 14481/15 a comprehensive version of the compromises tentatively agreed at the previous trilogues and the compromise suggestions by the Presidency. Text marked in brackets is considered to be still under final discussion, on which delegations may comment. 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.
8. The Presidency wishes to indicate that the present cover note will be completed in due time to take into account the discussions of the JHA Counsellors meeting of 30th November 2015, in particular on Article 83 relating to processing of personal data for archiving purposes in the public interest or for scientific, historical or statistical 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.

Data breaches – Article 31, Article 32

9. As regards the thresholds laid down in Articles 31 and 32 on respectively notification to the supervisory authority and communication to the data subject of personal data breaches, Member States showed flexibility to have a gradual approach in order to find a compromise with the European Parliament. The European Parliament considers that the proposed compromise solution, as indicated in document 14076/15, represents a significant move towards the Council by choosing the reference to “risk” for Article 31 and “high” risk for Article 32 as it is the case in the General Approach. As a consequence of such a gradual approach, Article 31(1a) of the Council’s General Approach is deleted. The wording proposed for Article 31(1) has been slightly amended to meet concerns expressed by Member States. A general obligation to document personal data breaches is included in Article 31(4). Taking into account the original positions of both co-legislators, the Presidency considers the compromise proposed is fair, balanced and would allow the supervisory authorities to fulfill their tasks without overburdening controllers.

Article 31(1) would read 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 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.*

Article 31(4) would read as follows:

4. *The controller shall document any personal data breaches referred to in paragraphs 1 and 2, comprising the facts surrounding the breach, its effects and the remedial action taken. This documentation must enable the supervisory authority to verify compliance with this Article.*

Data Protection Officer – Article 35

10. The European Parliament insists on a mandatory Data Protection Officer to be appointed in certain cases. This is an essential element in view of finding an overall compromise on the Regulation. The Presidency proposes that a mandatory Data Protection Officer be appointed in the following limited situations:

- the processing is carried out by a public authority or body, except for courts acting in their judicial capacity;
- the core activities of the controller or the processor consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of the data subjects on a large scale; or
- the core activities of the controller or the processor consist of processing on a large scale of special categories of data pursuant to Article 9 and data relating to criminal convictions and offences referred to in Article 9a.

The Presidency recalls that according to Article 35(2), a group of undertakings may appoint a single Data Protection Officer, and that according to Article 35(3), a single Data Protection Officer may be designated for several public authorities or bodies. Additionally, Article 36(4a) provides that the Data Protection Officer may fulfill other tasks and duties.

Furthermore, the Presidency proposes a transition period for the appointment of a mandatory Data Protection Officer in the cases mentioned above. The following wording is proposed in a new Article 35(4a):

4a (new). A data protection officer as referred to in paragraph 1 shall be appointed at the latest 12 months following the date specified in Article 91(2).

Finally, the Presidency considers that some tasks of the Data Protection Officer in Article 37(1) could be further nuanced to meet concerns of Member States.

Administrative Fines - Article 79

11. The Presidency compromise proposal for Article 79 comprises three categories of violations which may lead to the imposition of administrative fines. The Permanent Representatives Committee endorsed this approach on 26th November 2015, with some amendments made to Article 79 (3aa) (new). In terms of the level of fines, the Council's General Approach provided for three categories of fines graduated as follows:

- not exceeding 250 000 EUR, or in case of an undertaking, 0,5% of its total worldwide annual turnover of the preceding financial year;
- not exceeding 500 000 EUR, or in case of an undertaking, 1% of its total worldwide annual turnover of the preceding financial year;
- not exceeding 1 000 000 EUR, or in case of an undertaking, 2% of its total worldwide annual turnover of the preceding financial year.

The European Parliament provides for a single maximum amount of the fines up to 100 000 000 EUR or up to 5% of the annual worldwide turnover, whichever is higher.

On the basis of the proposed restructuring of the three categories in Article 79(3) (new) relating to obligations for controllers, Article 79(3a) (new) relating to the rights of data subjects, and Article 79(3aa) (new) relating to non-compliance with an order of the supervisory authority, the Presidency proposes the following maximum amounts as a basis for negotiations with the European Parliament:

- for Article 79(3) (new): not exceeding 1 000 000 EUR, or in case of an undertaking, 2% of its total worldwide annual turnover of the preceding financial year;
- for Article 79(3a) (new): not exceeding 2 000 000 EUR, or in case of an undertaking, 4% of its total worldwide annual turnover of the preceding financial year;
- for Article 79(3aa) (new): not exceeding 1 000 000 EUR, or in case of an undertaking, 2% of its total worldwide annual turnover of the preceding financial year.

Other issues

12. On the following issues, and in addition to those indicated in documents 14076/15 and 14319/15, the Presidency proposals relate either to minor modifications in order to align with tentatively agreed provisions elsewhere in the Regulation or that are based on a previously obtained negotiation mandate:
- Recitals (8), (15), (95)
 - Article 6(3a(e))
 - Article 7(4)
 - Article 9(1), (2(hb)), (4), (5)
 - Articles 14 and 14a
 - Article 19(2b) (new)
 - Article 26(4)
 - Article 38(1ab)
 - Article 53(1b(fa)) (new)
 - Article 79(5)

Conclusion

13. In view of the next trilogues with the European Parliament, the Presidency invites the Permanent Representatives Committee to examine the Presidency compromise suggestions with a view to confirmation 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.