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NOTE

From: German delegation
To: Working Party on Information Exchange and Data Protection
Subject: Pseudonymisation

The German delegation welcomes the Presidency's efforts to emphasise the pseudonymisation (...) of data as measures to reduce risks for data subjects. (...). Because processing pseudonymised data poses fewer risks for the rights and interests of data subjects, there is good reason to facilitate the processing of such data without removing them (...) from the scope of the Regulation.

The German delegation proposes taking the idea of pseudonymisation of data another step further, in order to encourage the use of pseudonymisation and make it more attractive to controllers while further improving the protection of data subjects. The German delegation therefore proposes the following additions to the text:

Art. 4 (3b) defines pseudonymisation as the application of measures making it impossible for the controller who processes the data to identify the data subject without disproportionate effort. Recital 23d~~f~~ explains that the “controller who processes the data” also refers to authorised persons within the same controller. This would allow companies to use data sets for statistical or research purposes (“Big Data”) while minimising risks to data subjects. If the controller who processes the data re-identifies pseudonymised data using keys or other information so that individuals can be identified, such **further processing** (...) would be subject to the strict material conditions given in the new Art. 6 (5). This material threshold corresponds to the possibility to process data over the objection of the data subject given in the original Commission and European Parliament position,

Art. 19. Thus by distinguishing between the rule (no identification) and the exception (possibility of identification), the idea of pseudonymisation measures may avoid the conflict between the necessary identification of the data subject and his or her desire not to be identified.

Recital 23 explains the conditions under which a person to whom the relevant data refer may be considered identifiable. This largely depends on how easy or difficult it is to acquire the information necessary for identification. Only those means need to be taken into account which can be used with a reasonable amount of time, expense and effort expended by the controller. It also (...) **states** that anonymous data do not come under the scope of the Regulation.

Changes are made to document 14270/14. Changes are made in **bold underlined** and *italics*.

23. The principles of data protection should apply to any information concerning an identified or identifiable natural person. Data including pseudonymised data, which could be attributed to a natural person by the use of additional information, should be considered as information on an identifiable natural person. To determine whether a person is identifiable, account should be taken of all the means reasonably likely to be used either by the controller or by any other person to identify the individual directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the individual, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration both available technology at the time of the processing and technological development. The principles of data protection should therefore not apply to anonymous information, that is information which does not relate to an identified or identifiable natural person or to data rendered anonymous in such a way that the data subject is not or no longer identifiable. This Regulation does therefore not concern the processing of such anonymous information, including for statistical and research purposes.

The principles of data protection should not apply to deceased persons, unless information on deceased persons is related to an identified or identifiable natural person.

23a) The application of pseudonymisation to data can reduce the risks for the data subjects concerned and help controllers and processors meet their data protection obligations. The explicit introduction of ‘pseudonymisation’ through the articles of this Regulation is thus not intended to preclude any other measures of data protection.

23b) (...)

23be) As a general rule personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. However, where further processing takes place by using measures of pseudonymisation, it should not be considered as incompatible with the purpose for which the data have been initially collected as long as the data subject is not identified or identifiable). (Art. 6 (3a) (f))

23cd) (...)

Under specific circumstances further processing which leads to revealing (re)-identification of the data subject should be allowed if the controller demonstrates compelling legitimate grounds which override the interests or fundamental rights and freedoms of the data subject (Art.6 (5)). The controller shall consider all the determinants of risk and assess whether a threat to the data subject exists. In addition to stronger pseudonymisation techniques, controllers shall put in place stringent administrative and legal safeguards to minimize the risks for the data subject. Any unlawful (re)-identification constitutes an infringement or violation and should be subject to appropriate, proportionate and effective sanctions including compensation for damages suffered as a result of an infringement of data protection rules.

23e) (...)

23df) *In order to create incentives for pseudonymisation, measures of pseudonymisation whilst allowing general analysis shall be possible within the same controller when the controller has taken technical and organisational measures necessary to ensure that the provisions of this Regulation are implemented. The concrete requirements for those measures shall depend on the respective data processing so that the personal data remain pseudonymised. The controller who processes the data within the meaning of Art. 4 (3b) shall also refer to authorised persons within the same controller. In this case however the controller shall make sure that the individual(s) performing the pseudonymisation are not referenced in the meta-data.*

24a) *Art. 7a gives data subjects the right to use aliases in information society services and serves two purposes: the effective exercise and enforcement of their right to freedom of expression within the framework of this Regulation and the ascertainment of the principles stipulated in Article 5 of this Regulation, namely data economy and use of pseudonymised data where applicable. The freedom to use blogs, forums and social networks and hold opinions is an expression of the rights conferred in Art. 11 of the Charter of Fundamental Rights of the European Union. The exercise of this right however shall not preclude necessary measures of criminal proceedings, especially measures to combat cyber-crime.*

Article 4

Definitions

- (1) 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly (...), in particular by reference to an identifier such as a name, an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person.

[...]

- (3b) ***'pseudonymisation' means the processing of personal data by the controller in such a way that the data can no longer be attributed to a specific data subject without the use of additional information, as long as such additional information is kept separately and subject to technical and organisational measures to ensure non-attribution to an identified or identifiable person, or can be attributed to such person only with the investment of a disproportionate amount of time, expense and manpower. (...)***

- (3c) (...)

Article 5

Principles relating to personal data processing

1. Personal data must be:

- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject;
- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;
- (c) adequate, relevant and not excessive in relation to the purpose for which they are processed;

- (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay;
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed, *especially by applying appropriate measures of pseudonymisation or anonymisation at the earliest possible stage*;
- (ee) processed in a manner that ensures appropriate security of the personal data.
- (f) (...)

- (...)

Article 6

Lawfulness of processing

1. Processing of personal data shall be lawful only if and to the extent that at least one of the following applies:
 - (a) the data subject has given unambiguous consent to the processing of their personal data for one or more specific purposes;
 - (b) processing is necessary 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;
 - (c) processing is necessary for compliance with a legal obligation to which the controller is subject;
 - (d) processing is necessary in order to protect the vital interests of the data subject (...);
 - (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;

- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a controller to which the data are disclosed except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. ***In assessing the interests it should be taken into account that the controller or personnel of the controller has taken effective measures of pseudonymisation of personal data in order to minimize the risk of the data subject. (...)***

This subparagraph shall not apply to processing carried out by public authorities.

2. (...)

3. The basis for the processing referred to in points (c) and (e) 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. Within the limits of this Regulation, the controller, processing operations and processing procedures, including measures to ensure lawful and fair processing, may be specified in this legal basis.

3a. (...)

5. (...)

Re-identification as a further processing of these data that are pseudonymised shall only be allowed based on points (a), (b), (c), (d) ~~or~~ (e) of Article 6 (1), or if the controller demonstrates compelling legitimate grounds for the re-identification which override the interests or fundamental rights and freedoms of the data subject. (...)

Article 7a

Right to use aliases in information society services

Data subjects shall have the right to use an alias, nickname or assumed name instead of their real name in information society services, having regard to the state of the art and the purpose of the service. The controller shall inform the data subject of this right.

SECTION 2

INFORMATION AND ACCESS TO DATA

Article 15

Right of access for the data subject

[...]

5. *Paragraphs 1 to 4 shall also apply to data that are processed under an alias in accordance with Article 7a. The request for information may be submitted under the alias.*

[...]
