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#### NOTE

From:	Presidency
To:	Permanent Representatives Committee
No. prev. doc.:	14318/15, 13914/15, 14605/15
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 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 12<sup>th</sup> March 2014.
4. The Council agreed on a General Approach (9565/15) on the General Data Protection Regulation on 15<sup>th</sup> 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 19<sup>th</sup> and 26<sup>th</sup> of November 2015. This covernote aims at presenting further compromise suggestions following the JHA Counsellors meeting of 30<sup>th</sup> November, as a complement to document 14605/15.

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.

## PRESIDENCY COMPROMISE SUGGESTIONS

In complement to document 14605/15, the Presidency invites the Permanent Representatives Committee to focus the discussion on the following issues.

### Sensitive data – Article 9

7. 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 definition of biometric data is based on specific technical processing. In order to find an agreement with the European Parliament, the Presidency proposes to further highlight this aspect when including biometric data in Article 9: "*biometric data specifically processed to uniquely identify an individual*". The Presidency indicates that this would not cover simple authentication via biometric data and allow for a more contextual approach.

An addition in recital (41) may be included to clarify that biometric data are to be considered as falling under special categories of personal data only if they are processed in order to uniquely identify an individual. Such biometric data would only be covered by Article 9 if they take the form of templates.

As regards Article 9(5), and following discussions by JHA Counsellors, the Presidency proposed to reformulate as follows: "*Member States may maintain or introduce further conditions, including limitations, with regard to genetic data or health data.*"

### Data portability – Article 18

8. As regards Article 18 and the right to data portability, the European Parliament insists on a provision concerning the direct transmission from controller to controller, at the request of the data subject, the Presidency proposes the following compromise suggestion as an indication of how the right to data portability might be exercised:

*2a. (new) In exercising his or her right to data portability pursuant to paragraph 1, the data subject has the right to obtain that the data is transmitted directly from controller to controller where technically feasible and provided for by those controllers.*

The Presidency also indicates that recital (55) providing that “*the data subject’s right to transmit or receive personal data concerning him or her does not create an obligation for the controllers to adopt or maintain data processing systems which are technically compatible.*”

#### **Dismissal of the members of the supervisory authority – Article 48**

9. 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 proposes, following discussions by JHA Counsellors, to reformulate this provision as follows in order to find a compromise with the European Parliament:

*A member may only be dismissed or deprived of benefits in cases of serious misconduct or if the member no longer fulfils the conditions required for the performance of the duties.*

In this context, the Presidency draws attention to Article 49(1) according to which Member States may provide by law for a number of conditions governing the members of the supervisory authority.

#### **Liability – Article 77**

10. When it comes to exemptions 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 stick to a “shall”-provision in Article 77(3) and to complete Article 77(4) by a reference to the compensation of the data subject 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.*

*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 for the entire damage in order to ensure effective compensation of the data subject.*

## **Sanctions – Article 79**

11. In order to ensure consistency with Article 79(3aa) (new), the Presidency proposes the following technical alignment in paragraph (3a)(new): “(c) *does not comply with ~~an order or~~ a temporary or definite limitation on processing or the suspension of data flows by the supervisory authority pursuant to Article 53(1b) or does not provide access in violation of Article 53(1).*” Article 79(3aa)(new) would remain as proposed.

## **Conclusion**

12. 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.

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