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NOTE

from:	General Secretariat
to:	Working Group on Information Exchange and Data Protection (DAPIX)
No. Cion prop.:	5853/12 DATAPROTECT 9 JAI 44 MI 58 DRS 9 DAPIX 12 FREMP 7 COMIX 61 CODEC 219
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)

Further to the invitation by the Presidency (CM 2338/12) delegations have sent in written comments on Chapters I and II of the 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.

The comments received are set out hereafter.

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BELGIUM

Comments Belgian delegation

I. General evaluation

A. Proposal of a Regulation

BE has a scrutiny reservation on the nature of the proposal and particularly the use of a Regulation. BE would like to propose a Directive with stringent measures for the private sector.

B. Delegated acts

BE has a reservation on delegated acts.

C. Distinction between public/private sectors

BE wants specific regulation to regulate the processing of personal data both in the public and private sectors.

D. Need to distinguish SME and large companies / Need to avoid increase of administrative burden.

- Concerning the distinction between SME and large companies: For BE the distinction should not be based on the number of the employees but on the quantity and the quality of the data processed.
- BE would like to avoid the increase of administrative burden for the companies.

II. Analyse article by article

Art. 2 *Material Scope*

2.1. This Regulation applies to the processing of personal data wholly or partly by automated means, and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.

BE has a scrutiny reservation because the regulation applies to the processing of personal data by the judicial authorities.

2.2. This Regulation does not apply to the processing of personal data:

(a) in the course of an activity which falls outside the scope of Union law, in particular concerning national security;
(b) by the Union institutions, bodies, offices and agencies;

For BE, the Regulation should be applicable to the European institutions.

(c) by the Member States when carrying out activities which fall within the scope of Chapter 2 of the Treaty on European Union;
(d) by a natural person without any gainful interest in the course of its own exclusively personal or household activity;

Concerning the article 2.2 d) BE would like to add a recital in accordance with the Lindqvist Case of the 6th November 2003: "That exception must therefore be interpreted as relating only to activities which are carried out in the course of private or family life of individuals, which is clearly not the case with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people."

Art. 3 *Territorial scope*

3.2 This Regulation applies to the processing of personal data of data subjects residing in the Union by a controller not established in the Union, where the processing activities are related to:
(a) the offering of goods or services to such data subjects in the Union; or
(b) the monitoring of their behaviour.

BE has a scrutiny reservation on the article 3.2.
BE would like to have more information on the way to make this article effective.

3.3 This regulation applies to the processing of personal data by a controller not established in the Union where the national law of a MS applies by virtue of international public law.

BE has a scrutiny reservation on the article 3.3.
BE would like to know in which cases this article will apply.

Art. 4 *Definitions*

4.3 'processing' means [any operation] or set of operations which is performed upon personal data or sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, erasure or destruction;

BE asks to put “any operation” between brackets. The requirements for a « set of operations » have to be more stringent than for “any operation”.

4.8 'the data subject's consent' means any freely given specific, informed and explicit indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action, signifies agreement to personal data relating to them being processed;

BE has a scrutiny reservation on the article 4.8.

4.10 Genetic data' means all data, of whatever type, concerning the characteristics of an individual which are inherited or acquired during early prenatal development;

For BE, the definition of « genetic data » is too large. BE would like a more restrictive definition.

4.12 'data concerning health' means any information which relates to the physical or mental health of an individual or to the provision of health services to the individual;

BE has a scrutiny reservation on the inclusion administrative data, the codes used by doctors and the accounting data in the definition of "data concerning health".

4. 13 'main establishment' means as regards the controller, the place of its establishment in the Union where the main decisions as to the purposes, conditions and means of the processing of personal data are taken; if no decisions as to the purposes, conditions and means of the processing of personal data are taken in the Union, the main establishment is the place where the main processing activities in the context of the activities of an establishment of a controller in the Union take place. As regards the processor, 'main establishment' means the place of its central administration in the Union;

BE has a scrutiny reservation on the definition of « main establishment ».

4.20 'transfer': communication or availability of the data to one or several recipients.

BE proposes to add a new definition to be in accordance with the revision of the Convention 108: « *4.20 'transfer': communication or availability of the data to one or several recipients.* »

Art. 5 *Principles relating to personal data processing*

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;
Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards

BE proposes to complete the article 5(b) with the article 6.1, b) of the current Directive 95/46/EC : "*Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards*"

(c) adequate, relevant, and limited to the minimum necessary in relation to the purposes for which they are processed; they shall only be processed if, ~~and as long as~~, the purposes could not be fulfilled by processing information that does not involve personal data;

BE considers that the terms « and as long as » lead to legal uncertainty.
BE would like to erase the terms « and as long as ».

(f) processed under the responsibility and liability of the controller, who shall be able to ~~ensure and~~ demonstrate for each processing operation the compliance with the provisions of this Regulation.

BE considers that this provision introduces an absolute obligation instead of an obligation of means.
BE proposes to turn "*who shall ensure and demonstrate*" into "*who shall be able to demonstrate*".

Art. 6 *Lawfulness of processing*

6.2 Processing of personal data which is necessary for the purposes of historical, statistical or scientific research shall be lawful subject to the conditions and safeguards referred to in Article 83 and in article 6.1.

BE considers that the article 6.2 has to respond to the conditions and safeguards referred to in Article 83 and in article 6.1 in order to be in compliance with the lawfulness of processing.
Moreover, BE wishes to have a recital which states that scientific research in the sphere of public health is to be considered as a public interest in the terms of article 6.1 (e).

6.3 The basis of the processing referred to in points (c) and (e) of paragraph 1 must be provided for in:

(a) Union law, or

(b) the law of the Member State to which the controller is subject.

The Union law and the law of the Member State must meet an objective of public interest or must be necessary to protect the rights and freedoms of others, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued.

BE considers that the second paragraph of article 6.3 (c) has to be extended to EU legislation.

6.4 Where the purpose of further processing is not compatible with the one for which the personal data have been collected, the processing must have a legal basis at least in one of the grounds referred to in points (a) to (e) of paragraph 1 if the process concerns the data mentioned in article 8 and 9. This shall in particular apply to any change of terms and general conditions of a contract.

BE recalls her scrutiny reservation on article 6.4 and asks to add the terms « if the process concerns the data mentioned in article 8 and 9 ».

~~*6.5 The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the conditions referred to in point (f) of paragraph 1 for various sectors and data processing situations, including as regards the processing of personal data related to a child.*~~

BE has a general scrutiny reservation on the issue of delegated acts. For BE this delegated act has to be erased.

Art. 7 *Conditions for consent*

7.2 If the data subject's consent is to be given in the context of a written declaration which also concerns another matter, the requirement to give consent must be presented distinguishable in its appearance from this other matter.

BE asks COM to state that this provision doesn't require a distinct consent for each specific consent.

7.3 The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal.
The controller has to fulfill the data subject's request within a reasonable delay.

BE would like to add the obligation for the controller to fulfill the data subject's request within a reasonable delay.

7.4 Consent shall not provide a legal basis for the processing, where there is a significant imbalance in the form of dependence between the position of the data subject and the controller.

BE has a scrutiny reservation on article 7.4 and awaits the COM proposal on this point.

Art. 8 *processing of personal data of a child*

*8.1. For the purposes of this Regulation, in relation to the offering of information society services directly to a child, the processing of personal data of a child below the age of 13 years shall only be lawful if and to the extent that consent is given or authorised by the child's parent**s** or custodian**s**. The controller shall make reasonable efforts to obtain verifiable consent, taking into consideration available technology.*

Grammar mistake: "*parent or custodian*" become "*parents or custodians*"
BE asks that the terms **"**offering of information society services "are clarified to include social networks, for example in a recital.

Art. 9. Processing of Special categories of data

9.1 The processing of personal data, revealing race or ethnic origin, political opinions, religion or beliefs, trade-union membership, and the processing of genetic data or data concerning health or sex life or criminal convictions or related security measures shall be prohibited

BE: why use “sex life” and not « sexual orientation » as used in the current Directive 95/46/EC?

9.2 Paragraph 1 shall not apply where:

a) the data subject has given consent to the processing of those personal data, subject to the conditions laid down in Articles 7 and 8, except where Union law or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject;

BE: How can we use data of dead people, for example for scientific research?

(h) processing of data concerning health is necessary for health purposes and subject to the conditions and safeguards referred to in Article 81;

BE: Quid for the processing of health data by insurance companies.

9.2bis Member States shall determine the conditions under which a national identification number or any other identifier of general application may be processed.

BE wants to add an article 9.2bis which is a copy-paste of article 8.7 of the Directive 95/46/EC: ” Member States shall determine the conditions under which a national identification number or any other identifier of general application may be processed”.

9.3 The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria, conditions and appropriate safeguards for the processing of the special categories of personal data referred to in paragraph 1 and the exemptions laid down in paragraph 2.

BE recalls her general scrutiny reservation for delegated acts.

Art. 10 ***Processing not allowing identification***

If the data processed by a controller do not permit the controller to identify a natural person, the controller shall not be obliged to acquire additional information in order to identify or to individualise the data subject for the sole purpose of complying with any provision of this Regulation.

BE would like to make a difference between data which permit an identification and data which permit the individualisation of the data subject. Both have to be covered in this article. BE suggests the idea of a particular regime for codified data and for data in the form of a pseudonym. Those kinds of data need a less high level of protection and also a definition.

CZECH REPUBLIC

CZ proposals for amendments regarding the General Data Protection Regulation (Chapters I and II)

CZ focuses on Articles only, as the recitals would have to be adapted later.

Generally

- CZ feels that the change of legislative form from directive to regulation needs to be further considered. While certain areas (competences and cooperation of DPAs, WP-29, EDPS, rules for European institutions, rules for private sector including e.g. e-Privacy directive) should be included in a regulation, the public sector within Member States should be regulated by directive. This would enable Member States to implement the rules into many sector-specific and procedural laws regulating the activity of public authorities. CZ would welcome high-level discussion on this systemic approach.

Article 2

- Paragraph 2(a) should be amended as follows:

"2.(a) in the course of an activity which falls outside the scope of Union law, in particular concerning **maintenance of law and order and internal security, defence,** State security **(including the economic well-being of the State when the processing operation relates to State security matters)**."

Explanation:
CZ believes that the exemption in Article 2(2)(a) does not fully reflect the respective competences of Member States and the EU (cf. Articles 72, 73 of TFEU).

- New paragraph should be inserted:

4. Processing of personal data by a natural person which is not part of its own gainful activity is subject only to rules in Article XY.

(Article XY would be situated in the Chapter IX of regulation and would consist of very basic provisions and appropriately flexible redress and sanctioning provisions.)

Explanation:
CZ believes that the exemption in Article 2(2)(d) is not sufficient to address very frequent forms of non-profit processing in the light of Lindquist judgment, such as making data available on the Internet. CZ believes that "light regulation" based on most essential principles should apply to such forms of processing as opposed to ninety articles of present draft.

Article 3

- In Article 3 paragraph 2 should be replaced by the following:

2. This Regulation applies to the processing of personal data of data subjects residing in the Union by a controller not established in the Union and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the Union, unless such equipment is used only for purposes of transit through the territory of the Union.

Explanation:
It is doubtful to extend the jurisdiction of the EU outside of its territory. It is not clear which instruments the Member States should use to enforce duties stipulated by regulation on such broad scope. The Commission certainly did not offer any. Instead, Art. 4(1)(c) of the Directive should be reused.

Article 4

- **IN ARTICLE 4 THE FOLLOWING PARAGRAPH SHOULD BE INSERTED:**

(2A) 'PSEUDONYMOUS DATA' MEANS ANY DATA WHERE DETERMINATION OF THE IDENTITY OF THE DATA SUBJECT REQUIRES A DISPROPORTIONATE AMOUNT OF TIME, EFFORT, OR MATERIAL RESOURCES.

Explanation:
There is a need for definition which could be used within the meaning of Art. 10.

- **THE FOLLOWING WORDS SHALL BE ADDED TO PARAGRAPH (3):**

"IF PERSONAL DATA ARE GENERATED EITHER THROUGH AUTOMATED MEANS OR BY INTELLECTUAL ACTIVITY, THEN SUCH OPERATION IS PROCESSING**".**

Explanation
The need to amend the existing historical definition stems out of the use of different technologies for processing of personal data in consequence of rapid technological developments. The protection of individuals should be technologically neutral and not depending on used techniques[1].
The term "collection" undoubtedly covers the beginning of the processing of personal data – and the very moment from which the regulation should apply— for processing based on collection of personal data from data subjects or receiving already existing data from another controller or someone else. Such a situation—as far the applicability of the regulation is concerned—is clear.

1 See Recitals 5 and 13.

Unclear is the starting moment for the applicability when personal data are created by controller who is carrying out the further processing, especially by technical means —such as video surveillance systems, smart devices systems using sensing applications, geolocation, usage-based billing, access control and advance monitoring in general. To give an example, someone may or may not be entitled to collect buccal cells for DNA examination (which is not a matter of data protection). As the lab starts creating DNA profile by analysing DNA, data protection rules would start to apply.
The "intellectual activity", it is in fact an explanation of "generation" so that the term is not understood purely in the sense of automated activity.

- **PARAGRAPH (6) SHALL BE DELETED.**

Explanation:
The difference between a controller and a processor is rather artificial and should be abandoned.

- **IN PARAGRAPH (8) THE WORD "EXPLICIT" SHALL BE REPLACED BY "PROVABLE".**

Explanation:
Implicit consents shall be also considered as valid. The capability of being demonstrated or logically proved is essential; the form which it takes may vary depending on technology or means of processing. Without this a data subject's consent would be basically meaningless.
This change also provides for technological neutrality and addresses another key feature of the data subject's consent—that the consent should be proved later. The form of such a proof shall not be limited to a written or otherwise recorded statement; on the contrary, it may consist in repeated performance of a set of operations.

- **IN PARAGRAPH (9) THE WORD "PERSONAL" SHALL BE REPLACED BY "SECURITY".**

Explanation:
The existing wording allows ambiguous interpretation: It is not clear whether it is not possible to claim that this is the only personal data breach (see also Recital 67) which would have severe consequences for supervision and in broader sense the protection of personal data. If the definition is intended for Art. 31 and 32, then the change of the term is the solution.

- In paragraph (10) the definition of genetic data should be more limited:

(10) "genetic data" means all data, of whatever type, concerning the characteristics of an individual which are inherited or acquired during early prenatal development**, and which may be discerned only by genetic analysis**.

Explanation:
If it would be stipulated that everyday observations like "black woman" are two genetic data, it would lead either to excessive exceptions from prohibition to process sensitive data or to unforeseen problems in practice.

- **PARAGRAPH 11 SHOULD, IF RETAINED, SPECIFY THE TERM "BIOMETRIC DATA" WITH MORE PRECISION:**

(11) 'identifying biometric data' means any data relating to the physical, physiological or behavioural characteristics of an individual **which are unique for each individual specifically**, such as facial images, or dactyloscopic data".

or it should be deleted or it should simply list appropriate biometric data.

Explanation:
Biometric data are all data about physical character of a human being (height, weight). In the GDPR only the unique biometric data shall be regulated specifically.
The term is used only in Article 33(2)(d) as a trigger of impact assessment. Do we really need a definition for such a case? If there is substantial concern, it would seem to address it with explicit provision that such and such data (facial images, dactyloscopic data) are biometric.

- Paragraph 12 should be substantially limited:

(12) "data concerning health" means **such information related** to the physical or mental health of an individual, or to the provision of health services to the individual**, which reveal significant information about health problems, treatments and sensitive conditions of an individual**.

Explanation:
The fact that a person has to wear eyeglasses or that it was in spa or that it is pictured on CCTV when entering a medical centre or that it will pay regular visit to a dentist next week should not be sensitive personal data. Sensitive data should relate to illnesses, treatments and other significant information primarily about health problems etc.
Word "reveal" is used to indicate that something evident (baldness, eyeglasses or leg in braces on picture) is not protected as sensitive.

- **PARAGRAPH 13 SHOULD BE DELETED.**

Explanation:
A main establishment based on such abstract notion as "the place where main decisions are taken" is not a good connecting factor in conflict of laws. The better would be a place of data processing, which should be used instead of "the main establishment" in Art. 51(2). However, CZ recognizes that the idea is to limit conflicts of jurisdiction. Therefore it remains open as to decisive factors in Article 51(2). It simply does not consider "main establishment" to be sufficiently precise as to limit conflicts of jurisdiction.

- **IN PARAGRAPH 14 THE WORDS "OF A PERSON OUTSIDE THE EU" SHOULD BE INSERTED AFTER THE WORD "REPRESENTATIVE".**

Explanation:
The regulation contains several kinds of representatives. Therefore it is necessary to distinguish among them. See Articles 33(4), 38 (2), or 64(3).

In paragraph 18 the definition of a child should be formally amended:

(18) "**under-age**/**minor** child" means any person below the age of 18 years;

Explanation:
CZ is aware of Article 1 of the UN Convention on the Rights of the Child. However, that provision is not applied directly in Czech law, where "child" means any person, however old, in relation to its parents (broadly used, e.g. in rules on inheritance). For people below the age of 18 Czech law uses "under-age" qualification. This purely formal change will allow much easier implementation of regulation by Czech natural and legal persons in practice.

Article 5

- **IN LETTER (B) THE WORDING SHOULD BE AS FOLLOWS:**

"(b) collected for legitimate, explicit **and reasonably specific** purposes and not further processed in a way incompatible with those purposes".

Explanation:
There is difference between 'specified' and 'specific'. Criteria should be sorted in natural way.

- Letter (d) should be amended as follows:

(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; **personal data established as inaccurate shall not be disclosed unless rectified or marked appropriately;**

Explanation:
"Where necessary" is added to keep the text in line with current Directive, in order to prevent administrative burden resulting from unnecessary and burdensome updating. Since data processing must be "fair", it is understood that when e.g. other processor relies on data being kept up to date, it is necessary to keep data up to date.
There is a need to provide for the quality in situations when personal data are to be transferred, more precisely to prevent controllers and processors from transferring personal data of the known inaccuracy. It should be taken into account that not every disclosure is publishing.

Article 6

- **IN PARAGRAPH 1(A), THE WORDS "IN ACCORDANCE WITH THE RULES AND CONDITIONS OF ARTICLE 7 AND, IF APPLICABLE, ARTICLE 8" SHOULD BE INSERTED AFTER THE WORDS "HAS GIVEN CONSENT".**

Explanation:
The condition of lawfulness should be formulated as clearly as possible. The reference to another article of the GDPR is the easiest way how to improve the current, unsatisfactory wording.

- **THE FOLLOWING LETTER SHOULD BE ADDED TO PARAGRAPH (1):**

(G) LAWFULLY PUBLISHED PERSONAL DATA.

Explanation:
Republishing is legitimate purpose of data processing. While some delegations were concerned about dissemination of information on convictions, that special case would still be limited by Art. 9(2)(j). Systematically it is a special kind of data processing purpose.

- In paragraph 1(f) the wording should be amended as follows:

(f) processing is necessary for the purposes of the legitimate interests pursued by a controller **or by the third party or parties to whom 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. ~~This shall not apply to processing carried out by public authorities in the performance of their tasks.~~

Explanation:
The consequences of exclusion of third parties have not been examined thoroughly. One can imagine a case where a private person discloses data to official body as a part of complaint or warning against other person. This is not a legal duty nor the private person pursues specific legitimate interest (it has not suffered harm itself).
Last sentence should be struck out, as it creates lot of uncertainty. For example, central banks may safeguard their premises with CCTV, simply because it is in their interest to maintain sufficient level of safety. However, it is not clear whether such CCTV would fall under "performance of central bank tasks", as its tasks are usually focused on monetary policy and financial market regulation instead of maintaining security. The same reasoning would apply to many other public institutions. As a result of this single concern, Member States might experience sudden need to formally include "ensuring security" into many laws just because of one sentence in regulation.

- Last subparagraph of paragraph 3 should be deleted.

Explanation:
This quasi-constitutional provision has no place in regulation. These considerations are enforced by the entire hierarchy of legal system, including, in Czech case, the Constitutional Court, and in case of all Member States, the European Court for Human Rights. CZ notes that this requirement relates to general law-making rather than to application of regulation in particular case. Therefore, principle of subsidiarity and respect to constitutional arrangements of Member States should prevail.

Article 7

- Paragraph 3 should be clarified as to what happens next, for example as follows:

The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal **or the lawfulness of further processing for a reasonable period after withdrawal if necessary for legitimate purposes pursued by controller or third persons**.

Explanation:
This wording attempts to explain what happens after the consent is withdrawn. As opposed to Article 6(1)(f), the conditions for further processing are somewhat less stringent, since the consent was first freely given, but the entire lawfulness is limited in time.

- Paragraph 4 should be deleted or made substantially more precise, for example as follows:

4. CONSENT SHALL PROVIDE A LEGAL BASIS FOR THE PROCESSING UNLESS IT IS GIVEN IN CIRCUMSTANCES INDUCING SIGNIFICANT IMBALANCE, IN PARTICULAR WHETHER THERE WAS NO GENUINE FREE CHOICE, OR THE DATA SUBJECT COULD NOT SUBSEQUENTLY WITHDRAW CONSENT WITHOUT DETRIMENT, OR THERE WAS SITUATION OF DEPENDENCE, OR THE BENEFITS OF PROCESSING UNEVENLY FAVORED THE CONTROLLER.

Explanation:

Significant imbalance is very unclear criterion. It is better to use directly in the text (as opposed to recital 34) the WP48 – Opinion 8/2001: "Reliance on consent should be confined to cases where the worker has a genuine free choice and is subsequently able to withdraw the consent without detriment". Also, other most relevant factors are proposed as to allow the judiciary to develop in a predictable direction but open-ended way.

Article 8

- Article 8 presents significant problems. First, it is not clear how the controllers are supposed to identify children on-line and to verify their age on-line. Therefore, deletion of Article 8 should be considered.

- If Article 8 is kept and abovementioned problem solved, it is necessary to address also the divergence of interests between parent/guardian and child (e.g. in cases of domestic violence or abuse).

- Third, the harmonization of age limit breaks established national systems. It may well happen that "age for online data sharing" would be different than thresholds used for other significant actions (driving license, age of marriage, working age etc.).

Article 9

- CZ prefers to focus on "risky processing" instead on sensitive data. CZ believes that, first, risky processing situations should be defined by reference in particular to purposes, extent, retention period and data processed, in a way that would be similar to Article 33(2). CZ also believes that the approach to risky processing should be more nuanced, e.g. by prohibiting certain risky processing, enabling some risky processing only on the basis of approval by DPA and allowing general exceptions in other cases.

- Paragraph 3 should be deleted, *as it is contrary to subsidiarity principle*.

Article 10

- This Article should be amended to include pseudonymous data:

If the data processed by a controller **are pseudonymous or** do not permit the controller to identify a natural person, the controller shall not be obliged to acquire additional information in order to identify the data subject for the sole purpose of complying with any provision of this Regulation.

Explanation:
Change in relation to proposed new Article 4(2a)

GERMANY

In its Communication of 27 March 2012 the Presidency invited the Member States to send in, by 9 May 2012, proposals for amendments or comments (other than those made during the DAPIX meetings) on Chapters I and II (Articles 1 to 10) of the Commission's Proposal for a General Data Protection Regulation.

A. Preliminary remark

I.

Germany would like to thank the Presidency for this renewed opportunity to comment on the Proposal for a Regulation. Germany agrees with the Presidency that viable solutions should swiftly be found to individual issues. That is why Germany is willing to put suggestions up for discussion at an early stage.

Germany welcomes the Commission's objectives, namely of modernizing and further harmonizing data protection legislation, adapting that legislation to the demands of the Internet age and global requirements, and improving law data protection enforcement. Germany would like to submit some general remarks on the proposed legislative acts. Germany is willing to engage in in-depth discussions in order to find solutions for problems which have already been identified. The proposals set out below can, therefore, only be regarded as provisional contributions to further deliberations on the legislative act. Germany explicitly reserves the right to review the individual proposals once more in the light of the discussion of the entire legislative act – i.e. at least following the end of the First Reading of the complete text. Comments on the Recitals will be submitted separately.

II.

Against this backdrop, Germany feels that at least the following points require further discussion. This will no doubt impact a number of rules – including those in the first two Chapters. In Germany's opinion these include:

1. Maintaining flexibility and creating optionality clauses for national legislatures, in particular in regard to the public sector. Member States must be able to retain their national rules – in particular where they provide a higher level of data protection than that provided in the legislative act – or to enact new ones.

2. Drawing a clear distinction in the legislative act between data processing in the public sector on the one hand and in the non-public (private) sector on the other. The aim should be to create a level playing field across Europe in the non-public sector through stronger harmonization compared to the public sector.

3. Clear rules in the legislative act governing the relationship between the fundamental right to data protection and conflicting fundamental rights, such as freedom of opinion, freedom of information, freedom of the press, freedom to conduct a business and freedom of research. Notwithstanding the pending discussion on Article 80 of the Proposal for a Regulation, Germany tends towards including the relevant rules in the first Chapters of the Regulation, for instance in the form of balancing clauses citing examples, for example in Article 6(1)(f).

4. The relationship to other EU legislation containing rules governing the processing of personal data (e.g. Directive 2008/48/EC, Directive 2002/58/EC and Directive 2001/20/EC) needs to be clarified and corresponding rules laid down in the legislative act.

5. The extent of the powers to enact delegated acts and in regard to implementing provisions delegated to the Commission must be significantly reduced. To some extent it is already questionable whether the powers actually refer to non-essential elements in the act, as required under Article 290(1) of the TFEU. In Germany's opinion this is not the case in respect of the powers laid down in the first two Chapters of the Commission's Proposal (Articles 6(5), 8(3) and 9(3)), for instance. Thus, a more specific rule should be laid down in the legislative act itself or by the Member States on the basis of a corresponding optionality clause. That said, Germany generally recognizes the need to enact further rules in regard to non-essential elements. Further alternatives for enacting more detailed rules should be discussed in this context, for example a regulated self-regulation procedure, which would need to be further specified, as is already being considered in Article 38 of the Proposal for a Regulation. Effective enforcement must be guaranteed.

6. The rules set out in Chapters I and II must be reconsidered in light of the debate on the consistency mechanism (Chapter VII). In view of the breadth and generality of the rules, they in particular appear to require interpretation. Germany is currently not convinced that harmonized interpretation, a pertinent objective, will be achieved in practice through the proposed interplay between the supervisory authorities and the Commission. Notwithstanding practical considerations in regard to feasibility, there are legal doubts as to compatibility with the principle of the independence of supervisory authorities.

7. All the rules laid down in the Regulation must, ultimately, also stand up to scrutiny as to whether they can be applied and have been shaped so as to be open to all technologies and developments linked to the Internet and future technical conditions, including new trends and services such as cloud computing. In Germany's opinion, the Commission needs to provide further explanations in this regard.

8. The rules set out in Chapters I and II must be revised once more following the end of the First Reading of the Regulation to ensure that an appropriate distinction is drawn between personal privacy associated with less problematic data processing on the one hand and more problematic data processing on the other. A final evaluation of this issue will not be possible until rules have been discussed for which the Proposal contains initial suggestions (e.g. Article 34 of the Proposal for a Regulation). It should, for instance, also be examined in this context to what extent the use of anonymized data may be sufficient to achieve certain purposes or to what extent it is possible to draw distinctions according to the directness of the personal reference, so that pseudonymized data, for example, could be put to further use than direct personal data.

9. Requirements in respect of data economy when it comes to shaping data processing systems and procedures and other mechanisms, in particular technical data protection (anonymization, pseudonymization), should already be included in the first Chapters. We would like to ask the Commission to put forward suitable proposals in this regard in addition to the comments under B.

10. The first few Chapters should be reviewed in more detail following the end of the First Reading of the complete text in order to examine whether an appropriate balance has been struck between the data subject's interest in protection and the amount of administrative burden placed on enterprises and small and medium-sized enterprises (SMEs) in particular. Alternative models should be considered to the exemptions proposed by the Commission, which are solely guided by the size of the enterprise. Examples of such alternatives would be accountability and information obligations geared to the threat to personal privacy (see 8. above). Further, it should be examined to what extent deviating rules could be admissible for SMEs with a purely local sphere of activity (e.g. local craft businesses).

11. The scope of the exemption laid down in Article 2(2)(d) (for exclusively personal and household activities) requires further discussion on account of its fundamental significance and wide-ranging impact; it should therefore be placed in brackets.

III.

1. No general discussion involving the Member States and the Commission has yet been held in the context of DAPIX regarding Articles 9(2)(b) to 10 of the Proposal. In Germany's view, comments by individual delegations submitted in writing to the Presidency do not adequately compensate for such a discussion.

2. Other comments Germany submitted orally in the context of DAPIX meetings will also be addressed in the following, some for the second time. Germany cannot tell whether these comments were included in their entirety in the minutes by the Presidency and the Council Secretariat. The Presidency Note announced in Council Document 7221/12 of 8 March 2012 regarding an article-by-article discussion of Articles 1 to 4 and the minutes of the Working Group meeting on 14/15 March 2012 have not yet been forthcoming.

The following comments should not be regarded as final. This especially applies with regard to the delimitation of the scopes of the General Data Protection Regulation and the Data Protection Directive in respect of criminal prosecution, in particular also when it comes to questions concerning the applicability of the General Data Protection Regulation to the field of general threat prevention regarding legally protected interests which are not protected under criminal law. Germany reserves the right to submit further comments, including on fundamental, cross-cutting issues. Where editorial notes or comments have been made regarding the German version of the Regulation, these should not be regarded as agreement with or withdrawal of a reservation against the rule in question.

B. Comments on individual articles

I.

Germany enters a general scrutiny reservation in regard to the Proposal for a Regulation and, depending on the content, also in regard to its legal form. The reservations against those individual rules put forward in DAPIX still hold. The following proposals are submitted subject to clarification of the aforementioned fundamental issues. The Recitals referring to the individual articles would then need to be adapted accordingly.

II.

1. Article 1

The impact of paragraph (3) in a directly applicable Regulation has not yet been clarified. The Council's Legal Service needs to provide information on whether the provision is necessary in view of the chosen legal basis and the free internal market. Subject to this information, Germany would tend towards deleting this paragraph. It should provisionally be placed in brackets.

2. Article 2

– Paragraph (2)(a) should contain as comprehensive a list of individual activities which fall outside of the scope of Union law as possible. The explanations the Commission has so far provided in the Council do not explain which activities "*fall outside the scope of Union law*". The Commission should, in particular, set out whether the Regulation is to apply to the field of education, social security, threat prevention outside of the scope of criminal law, domestic procedural law applicable to courts, international mutual assistance and the prison system.

– Paragraph (2)(b) should be deleted. Excluding EU organs from the scope of application appears impracticable in many areas. This especially applies to areas in which the relevant EU rules provide for close administrative dovetailing between the national authorities on the one hand and European authorities and the Commission on the other, for instance in the field of pharmaceutical products (e.g. proceedings for mutual recognition in accordance with Directive 2001/83/EC) or the European Statistical System (Regulation (EC) No 223/2009). Different legal standards should not apply to data protection for the involved European and national authorities in the context of such procedures.

– In paragraph (2)(e) the phrase "*Vollstreckung strafrechtlicher Sanktionen*" in the German version should be replaced by "*Strafvollstreckung*" in line with Article 1(1) of the Proposal for a Directive. In the opinion of the Federal Government, the wording of Article 2(2)(e) results in the Proposal for a Directive being final as regards scope, and the Proposal for a Regulation thus not being applicable. This should, if necessary, be clarified in a Recital. Along with prosecuting and preventing criminal offences, which are reliably covered by the Proposal for a Directive, the German police authorities are specifically tasked with general threat prevention in the context of matters which do not fall within the scope of criminal law. This very important aspect of the police's practical area of responsibility is likely not covered by the scope of the Directive. However, the question thus arises to what extent the General Data Protection Regulation should apply to police threat prevention tasks which do not consist in the prevention of criminal offences. The Regulation does not appear appropriate in this field of police data processing. In view of the fact that it is often not possible to draw a clear distinction between the prevention of criminal offences and "other" threats, this is unacceptable. It is essential that the scope of the two legislative acts be clearly defined.

– The Council´s Legal Service should examine, in regard to paragraph (3), whether reference should not be made to the national law of the Member States implementing directives. It should, further, be examined what impacts will ensue in regard to other rules in Directive 2000/31/EC and other EU legislative acts, in particular insofar as they contain data protection rules (e.g. Article 9 of Directive 2008/38/EC – Consumer Credit Directive). As well as including exemptions in favour of Directive 2000/31/EC, it should be examined which difficulties arise in practice in regard to delimitation and whether it would be better to consider including in the new Regulation provisions from other legislative acts, for instance the so-called "cookie rule" in Directive 2002/58/EC.

3. Article 3

– Germany welcomes the transition to the "marketplace principle" (the applicability of the law of the state to which market goods or services are offered). However, the current system for implementing this principle appears to be inconsistent. As regards practical implementation, in particular the link to the obligation to designate a representative under Article 25 should be reviewed.

– Paragraph (2)(a) should convey that it not only covers goods or services which are paid for, for example by adding the words "*against payment or free of charge*" after "*services*".

4. Article 4

– Paragraphs (3) to (5) need to be re-examined to see to what extent they are applicable to and meaningful for existing and emerging procedures and services in the health sector, in particular the processing of pseudonymized or data rendered unintelligible and the administration of medical file systems under the patient's control ("google health", "health vault").

– The "*blocking*" of data should be reintroduced in paragraph (3).

– "*Erasure*" should be defined with a view to Article 17.

– In paragraph (3), the words "*to a third party*" should be added after "*making available*".

– The Recitals regarding paragraph (4) should, by way of example, explain, for instance in regard to social networks, which collection of data this term covers and whether there are overlaps. Can it be assumed, for example, that the same data are attributed to a file for which a provider such as Facebook is responsible on the one hand and to a file for which the user is responsible on the other (e.g. a bulletin board or blog in the social network)?

– The "*publication*" of data should be defined.

– A definition of anonymization and pseudonymization should be included, as is, for example, the case in section 3(6), (6a) of the German Federal Data Protection Act (*Bundesdatenschutzgesetz*). Follow-up changes would have to be made, for example in Article 2(2) regarding the scope or in Article 4(3), namely that no "*processing*" occurs if the procedure serves the anonymization of the data.

– The definition of the "*third party*" should again be included in front of paragraph (7), in line with Article 2(f) of Directive 95/46/EC.

– In paragraph (7) the words "*regardless of whether they are a third party or not*" should be added after "*are disclosed*" in accordance with Article 2(g) of Directive 95/46/EC.

– The conditions for electronic consent should be created in paragraph (8) as is, for example, the case in section 13(2) of the German Telemedia Act (*Telemediengesetz*).

– Paragraph (9) should read as follows:

'personal data breach' means a breach which leads to the unintentional or unlawful loss, the unlawful alteration or the unauthorised transmission of or unauthorised access to personal data which are transmitted, stored or otherwise processed.

– In paragraph (10) the term "*genetic data*" should be delimited more precisely from "*health data*", as the definition is currently too broad. In principle, no distinction is drawn between different types of genetic data as is the case, for example, under the German Act on Genetic Testing Humans (*Gendiagnostik-gesetz*). In the German version the term "*Merkmale*" should be replaced by the term "*Eigenschaften*". A definition corresponding to that used in the German Act on Genetic Testing in Humans could read as follows:

'Genetic data' means data concerning genetic characteristics acquired by means of a genetic analysis; genetic characteristics are genetic information of human origin which is inherited or acquired during fertilisation or up to birth;

– The following should be added at the end of paragraph (11): "*; the signature of the data subject shall be exempted"*.

– In paragraph (13) the criterion chosen for defining the main establishment, namely the "*place (...) where the main decisions (...) are taken*" should be discussed once more. Germany is of the opinion that the definition of the main establishment cannot be assessed in isolation from the "one-stop-shop" rule in Article 51(2) and the other provisions in Chapters VII and VIII of the Proposal for a Regulation, which is why Article 13 needs to be discussed again at a later date. In addition, it should be pointed out that the Proposal for a Regulation contains no rules whatsoever on which supervisory body is to have (main) responsibility in the case of Article 3(2) if the controller has no main establishment in the EU.

– In paragraph (15) the phrase "*a self-employed economic activity*" should replace "*an economic activity*". The remainder of the sentence following "*thus including*" should be deleted.

5. Article 5

Greater consideration should be given to the possibility of using pseudonymized data. In particular, the principles in regard to the extent to which they can realistically be transferred to the Internet should be re-examined. The principle of data protection using technical means should be included in Article 5 as a further principle of data processing.
Notwithstanding the above, the following changes at least should be made:

– In subparagraph (b), the word "*genau*" should be deleted in the German version.

– Subparagraph (c), first clause, of the German version should read as follows: "*den Zwecken entsprechen, für die sie verarbeitet werden, dafür erheblich sein und auf das notwendige Mindestmaß beschränkt sein;".* In the second clause, the phrase "*von anderen als personenbezogenen Daten"* should explicitly refer to pseudonymous and anonymous data.

– In subparagraph (d), "*if necessary*" should be added at the beginning of the sentence.

– In subparagraph (e), first clause, the German version should read as follows: "*nicht länger, als es für die Realisierung der Zwecke, für die sie verarbeitet werden, erforderlich ist, in einer Form aufbewahrt werden, die die Identifizierung der betroffenen Personen ermöglicht;".*

– Subparagraph (f) should be placed in brackets for the time being since it is hard to tell what the impact of the provision – including in connection with Article 24 – will be; subparagraph (f) should be revised so that it is clear who will hold overall responsibility where there are several controllers holding responsibility.

– A new subparagraph should be included regarding the principle of data security. It should read as follows: *"protected during processing by means of appropriate technical and organisational measures having regard to the state of the art and the costs of implementation*."

6. Article 6

In the interests of creating a clearer structure, a distinction should be drawn between the powers of public bodies and those of non-public bodies to process personal data. This distinction should apply to the entire Regulation, for example by structuring it in relevant sections. It appears particularly urgent to draw this distinction in Article 6.

Further, this provision should give occasion during a Second Reading to again clarify the relationship to Member States' existing sector-specific provisions. In particular the precise extent of the powers given to the Member States in Article 6(3) of the Proposal for a Regulation in regard to creating the legal bases for data processing by public agencies is not evident even after previous discussions in DAPIX. For example, the Commission's explanatory statement made it clear that the Commission also assumes that a considerable volume of specific national legal bases in regard to data processing by public agencies should in principle also be retained after the Regulation is adopted. However, it is still unclear how much the Regulation is to be opened up in favour of Member States' laws – i.e. whether the power is restricted to a general clause-type rule in domestic law or whether other details, such as purpose, type and extent of the data, recipient and time limits for erasure, can or even must be laid down in national laws over and above that – as in the case of many sector-specific German provisions. We would ask that it be clarified whether "*law of a Member State*" only covers statutory regulations or whether there is also scope for non-statutory rules.

Notwithstanding the above, Germany would at least like to support the following changes:

- In paragraph (1)(a), the word "*genau*" should be deleted in the German version.
- In paragraph (1)(b), the words "*auf Antrag*" should be replaced by "*auf Veranlassung*" in the German version.
- Consideration should also be given to including quasi-contractual relationships in paragraph (1)(b).
- In paragraph (1)(c), "*gesetzlichen*" should be replaced by "*rechtlichen*" in the German version.
- Paragraph (1)(d) in the German version should read as follows: "*Die Verarbeitung ist erforderlich für die Wahrung lebenswichtiger Interessen der betroffenen Person.*"

– In paragraph (1)(e), we would like clarification on who is responsible for interpreting the term "*in the public interest*".

– Paragraph (1)(f), first sentence: Germany believes this provision needs to be specified more precisely and therefore suggests putting this key rule in brackets until agreement has been reached on what form it is to take. Germany rejects the Commission's specification of the provision, as suggested in Article 6(5) (see A.II.5 above). At any rate, the interest of the "*third party to whom the data are disclosed*" must be included in paragraph (1)(f), first sentence. How the protection of children is to be included also needs to be further specified.

– In accordance with the legal situation pursuant to Directive 95/46/EC, the processing of personal data for scientific purposes should be privileged in paragraph (2). In analogy with Article 6(1)(b), second sentence, of Directive 95/46/EC, the text of the Regulation should therefore itself specify that the further processing of personal data for historical, statistical and scientific research is not to be regarded as incompatible with the purposes of the previous data collection where certain conditions and guarantees are met, for example as are set out in Article 83(1)(a) and (b) or could be laid down in Article 83. This would also specify the "*limits of this Regulation*" in accordance with Article 83 in regard to the lawfulness of further processing.

– The possibilities for explicitly delegating powers to the Member States in regard to the making of additions to regulations, which are recognized in the case law of the European Court of Justice (ECJ), are not sufficiently exhausted in the restrictions imposed on national legislation in paragraph (3), second sentence. In view of the requirements regarding the protection of personal data which are already set out in the laws of the Member States and in the Charter of Fundamental Rights, the requirement of an additional limitation of Member State powers to introduce rules, which numerous Member States have already raised during the consultations, must be examined once more in detail in the course of the further discussions.

– Paragraph (4), first sentence, should be placed in brackets. The wording currently appears to contradict Article 5(b). In addition, the wide-ranging limitation imposed on further processing for another use by excluding Article 6(1)(f) requires further discussion.

– Paragraph (5) should be revised such that the necessary specifications can already be made in the act itself or by the Member States. Article 6(1)(f) in particular contains a key rule relating to the admissibility of data processing, which means that its content should already be specified more precisely in the Regulation itself. In the context of revising Article 38 it should also be examined to what extent rules can be further specified by means of regulated self-regulation through codes of conduct.

– In addition, general admissibility regarding the publication of personal data should be included in Article 6, since this form of processing constitutes a particularly severe level of interference. Germany would like to ask the Commission to make a relevant proposal. It should refer to the non-public sphere and also strike a balance with the general principle of freedom of opinion.

7. Article 7

It should be examined, overall, in which generally/abstractly defined cases consent should always be required as a matter of principle. Cases should be considered in which personal privacy is exposed to particular threats, for example on account of the sensitivity of the data processed. Vice versa, it should also be examined in which cases consent alone is not sufficient to protect the data subject. Notwithstanding the aforementioned, the following changes at least should be made:

– In paragraph (1), the word "*eindeutig*" should be deleted in the German version.

– In paragraph (2), the words "*or electronic*" should be added after "*written*".

– Paragraph (4) should be placed in brackets. The term "*significant imbalance*" requires further clarification, also because it is vague. It must also be further clarified whether cases can be listed for which it is refutably assumed that the consent of the data subject has not been given voluntarily or whether it should be left to the Member States to enact a rule in accordance with Article 82.

8. Article 8

Germany backs the idea underlying the rule, namely to look separately at the processing of the personal data of a child and to set down specific, higher standards of legal protection. However, we would ask the Commission to propose a concept for the technical implementation of this provision. It should, in particular, address the issue of how age is to be verified and whether an EU-wide authentification or identification system would be necessary. In its report the Commission should also address other protection concepts, for example youth protection programs or age-appropriate default settings such as are currently being discussed in the "CEO Coalition to make the Internet a better place for children". Notwithstanding this, Germany has the following requests for changes:

- Paragraph (1), first sentence, should be put in brackets. The Commission should detail in writing how it defines "*information society services*" and whether they include services by search engine providers or data processing in social networks, for instance. The scope of the rule should be clarified. It is unclear, for example, whether the need for the consent of the parents or guardian should only apply to cases where the child consents in accordance with Article 6(1)(a) or in respect of all processing in accordance with Article 6(1).

- In paragraph (1), second sentence, the efforts of the person responsible for the processing of the data should not only take into account the available technology but also the level of threat to the personal privacy of the child associated with the data processing.

- In paragraph (1), second sentence, the word "*verifiable*" should be deleted, since the issue of the burden of proof has already be resolved in Article 7(1).

- Paragraphs (3) and (4) should be revised with the aim of enabling the necessary specifics to already be laid down in the legislative act itself or by the Member States.

9. Article 9

It should be examined whether the concept of an exhaustive catalogue of sensitive data is to be retained. Even if the use to which data are to be put is not the decisive factor when determining the sensitivity of all types of data (e.g. genetic data), stronger account could, in relevant cases, be taken of this criterion when defining sensitive data, whereby the current types of data would at least constitute examples. Notwithstanding this, Germany has the following requests for changes:

– Paragraph (1): Please replace the words “Daten über die Gesundheit” in the German version with “*Gesundheitsdaten”*.

– Paragraph (2)(b) of the German version should read as follows: “*die Verarbeitung ist erforderlich, um den Rechten und Pflichten des für die Verarbeitung Verantwortlichen auf dem Gebiet des Arbeitsrechts Rechnung zu tragen, sofern dies aufgrund von Vorschriften der Union oder dem Recht der Mitgliedstaaten, das angemessene Garantien vorsieht, zulässig ist, oder*”.

– Paragraph (2)(g) should read as follows: “processing is necessary for the performance of a task carried out for reasons of substantial public interest, on the basis of Union law, or Member State law which shall provide for suitable measures to safeguard the data subject's legitimate interests; or”.

– Paragraph (2)(h) and (i): The Commission should explain whether the provisions are to be understood as final rules concerning the processing of health data or processing for historical, statistical and research purposes, and whether they also rule out consent-based processing of these data. The legal situation regarding the processing of health data for research purposes by persons who are unable to give their consent will also remain unclear until the adoption of a delegated act in accordance with Article 83(3) and Article 81(2).

– Instead of paragraph (2)(j) and including data on criminal convictions and related security measures in paragraph (1), a separate rule corresponding to Article 8(5) of Directive 95/46/EC should be provided for, including the third sentence of that Article.

– Paragraph (3) should be deleted.

10. Article 10

Article 10 should be placed in brackets. The rule requires further discussion, for example depending on the definition of personal data, the inclusion of rules on pseudonymized data or with regard to the specific characteristics of a data subject, such as age in accordance with Article 8.

ESTONIA

Please find below the Estonian contribution to the process of the elaboration of the general data protection regulation. Estonia welcomes the data protection reform and its general aims. Furthermore, it is important to encourage innovation and economical growth, lower administrative burden and ease the regulative environment. Therefore, we would like to present some comments pointing out the aims the regulations should achieve:

1. The objectives of the regulation should be balanced. Art 1 subpar 2 lays down the rule that regulation protects the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data. The free movement of data should not be restricted nor prohibited. Since one of the general goals of the reform has been identified as promotion of economical growth and innovation, these ideas should be named under the general objectives of the regulation. If the economical dimension is clearly presented in objectives, it would be easier to balance the data protection provisions with the goals of the internal market.

We have already pointed out that the protection of the personal data should also be balanced with other fundamental freedoms, especially with the right to receive and impart information.

2. To lower administrative burden, it would be relevant to re-consider the material scope of the regulation (art 2). Furthermore, it is important to clarify which rules and obligations apply to the micro entrepreneurs and SMEs. Although we agree that general principles of data protection should in general apply to all types of enterprises and organizations, the size of the enterprise should be taken into account the possibility to exclude micro enterpreneurs from the scope of the regulation. For example in some cases the obligation of the controller or processor could be disproportionally burdensome for a small enterprise.

The question of the administrative burden rises also with regard to the public bodies. It should be clearly stipulated in material scope to what extent and in which situations do the Member States have a right to enforce their own rules. Otherwise, the main goal of the reform – to have same rules for 27 Member States – would not be achieved.

We also suggest that the rules should apply to the EU institutions and bodies. Establishment of unified rules is one of the main targets of the proposal and it is important to keep the list of exceptions as short as possible. All the exemptions must be clealy reasoned.

3. From our point of view, there are many definitions given in art 4 that are neither significant nor need explanation. We consider it important to keep the regulation clear and therefore only important definitions should be given in the document. We would suggest deleting the following: filing system; recipient; personal data breach; genetic, biometric data and data concerning health; representative; child and supervisory authority.

4. Next, we would suggest reconsidering the art 7 subpar 4, ("where consent shall not provide a legal basis for the processing of data, where there is a significant imbalance between the position of the data subject and the controller"). Consent is an expression of the will in the civil law context and the annulment of the consent should be based on certain rules. We do not agree that consent could be considered annulled just on the basis of the position of the persons involved.

5. There are some questions concerning the processing of the special categories of data and its derogations. Additional explanations would be necessary; whether art 9 subpar 2 p h is comparable with the existing stipulation of the directive. The directive provides that art 8 paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.

From our point of view, the scope of the abovementioned new provision is narrower. Therefore, to maintain for example our IT-solutions, we would suggest widening the exemption to process data concerning health.

SPAIN

The text has been marked as follows:

~~Strikeout~~ Deleted text

Bold and underlined Text to be inserted

Italics Reasoning

Broken underlining **While it is not necessary to amend the text of the Articles at this point, each aspect identified needs to be discussed in depth, and could trigger amendments down the line.**

Recitals

Amendment 1

(16)(a) The protection of individuals with regard to the processing of personal data by competent authorities, both national and Community (Eurostat), for the purposes of producing and disseminating the official statistics entrusted to them, is the subject of specific legal instruments at Union level. Therefore this Regulation should not apply to processing activities for such purposes. However, data processed by statistical authorities must be governed by the most specific legal instruments at Union level (Regulation EC) No 223/2009 on European statistics, Commission Regulation (EC) No .../... concerning access to confidential data for scientific purposes and the specific Regulations governing the production of various Community statistics).

(16)(b) The protection of individuals with regard to the processing of personal data by authorities, both national and Community, that are competent for drawing up electoral rolls, is the subject of specific legal instruments at Union level. Therefore this Regulation should not apply to the processing activities for such purposes.

Reason

Though originally invited to submit proposals and suggestions in relation to Chapters I and II only, we are also suggesting some amendments to the recitals which we feel are necessary in order to allow a better understanding and application of the amendments that we are proposing in relation to the Articles themselves.

Article 2

Comments:

Article 2(2)(a)

As regards national security, some of the problems that can be encountered when trying to get to grips with this vague legal concept have already been outlined in the Working Party[2].

There is no objection to the exclusion of all national security issues, which lie outside the scope of Union law. However, we think that with a view to establishing the scope of this concept and the adequate safeguards for security, there needs to be discussion in the context of the negotiation of the 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.

[2] While the concept of national security does appear in primary law, it is not defined (Article 73 TFEU, Article 4 of the Treaty of 7 February 1992, Treaty of Lisbon, Declaration on Article 16 TFEU), which suggests that it is at most an essential function of the State.

Article 2(2)(b)

The Union institutions and bodies should not remain entirely outside the scope of the Regulation.

If the aim of this instrument is to establish, on a uniform basis throughout the Union, core principles and guarantees in relation to the processing of personal data, the exclusion of the European institutions fuels the notion, at least formally, that there are two separate legal systems: that of the Member States and that of the Union, and while there is no reason why the basic principles would not apply to both the Member States and the Union, we believe it would be more appropriate to establish uniform regulations for all, without prejudice to the possibility of having a separate legal framework purely to lay down rules and regulations for such specific requirements of the European institutions as are absolutely necessary, which should at no point be separated from the core rights and guarantees contained in the proposal for the Regulation that justify the existence of the personal data protection system.

Amendment 2

2. This Regulation does not apply to the processing of personal data:

(a) in the course of an activity which falls outside the scope of Union law, in particular concerning national security;

(b) by the Union institutions, bodies, offices and agencies;

(c) by the Member States when carrying out activities which fall within the scope of Chapter 2 of the Treaty on European Union;

(d) by a natural person without any gainful interest in the course of its own exclusively personal or household activity;

(e) by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.

(f) by competent authorities for the purposes of producing and disseminating the official statistics entrusted to them;

(g) by competent authorities for the purposes of drawing up electoral rolls.

Reason

The protection of individuals with regard to the processing of personal data by competent authorities, both national and Community (Eurostat), for the purposes of producing and disseminating the official statistics entrusted to them, is the subject of specific legal instruments at Union level. The same applies to electoral rolls.

Article 4

Amendment 3

Definition 9:

(9) "personal data breach" means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or **illegal** access to personal data transmitted, stored or otherwise processed;

Reason

The concept of a personal data breach needs to be more clearly defined.

Amendment 4

Definition 20 – *new definition*:

(20) "statistics" means quantitative and qualitative, aggregated and representative information characterising a collective phenomenon in a considered population;

Definition 21 – *new definition*:

(21) "electoral roll" means personal data and data relating to the place of residence of persons entitled to vote.

Reason

To ensure that the amendment to Article 2 (which excludes official statistics and electoral rolls from the scope of the Regulation) can be properly implemented.

Article 5

Amendment 5

Article 5(e)

(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; personal data may be stored for longer periods ~~insofar as the data will be processed solely for historical, statistical or scientific research purposes~~ **in the cases set out in**, and in accordance with the ~~rules and~~ conditions of Article 83 and if a periodic review is carried out to assess the necessity to continue the storage;

Reason

In the Spanish version an "s" is missing in the article following the preposition "para". In addition, there is no need for a literal repetition of the cases covered in Article 83, nor for a reference to "the rules", since that is precisely what Article 83 contains. Instead, a reference to the article in question would be sufficient, retaining the two key ideas of the possibility of a longer processing period, and periodic review.

Comments relating to (e)

As regards this point, Spain understands that processing data for statistical purposes is a field of extraordinary importance for both the public and the private sectors and requires a legal context which adequately protects the rights of the data subject while allowing official statistical work to be done effectively and efficiently. That is why, since numerous provisions of the proposed Regulation may have a direct bearing on official statistics and the drawing up of electoral rolls and since in addition there are legal instruments in the Union that specifically govern those activities, and since the Commission is currently working on drawing up two new Regulations on statistics, we think there is a need for a thorough analysis of these issues.

Furthermore, the Chair of the Working Party on Statistics recently wrote to the Chair of the Working Party on Information Exchange and Data Protection, noting that the Working Party on Statistics had concerns about aspects of the proposal for a Regulation under discussion.

We gather that these concerns cannot be allayed, and therefore we suggest that they be discussed in the context of a general discussion of the specific issues that statistics pose for data protection. A discussion that should be conducted in as coordinated a way as possible with the Working Party on Statistics, to find the most appropriate and consistent solutions.

Amendment 6

Paragraph (f):

~~(f) processed under the responsibility and liability of the controller, who shall ensure and demonstrate for each processing operation the compliance with the provisions of this Regulation.~~

Reason

For clarity and simplicity, we propose deleting (f), since the responsibility is not so much a principle of data processing as a possible consequence of it; the proposal for a Regulation already contains a body of provisions designed to define and regulate the potential responsibilities of the various actors who do or can have a role in the processing of personal data (chapters IV and VIII).

Article 6

Amendment 7

Paragraph 3

3. The basis of the processing referred to in points (c) and (e) of paragraph 1 must be provided for in:

   (a) Union law, or

   (b) the law of the Member State to which the controller is subject.

~~The law of the Member State must meet an objective of public interest or must be necessary to protect the rights and freedoms of others, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued.~~

Reason

We propose deleting the last subparagraph of paragraph 3. The reason is that in this case there is no justification for an additional requirement on the Member State's legislation with respect to Union law. Furthermore, it seems clear that Member States' law, like that of the Union, must by definition respond to objectives of public interest, respect fundamental rights and the essence of the right to the protection of personal data. The reference here to the principle of proportionality would also apply to Union law in general.

Amendment 8

Paragraph 5

~~The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the conditions referred to in point (f) or paragraph 1 for various sectors and data processing situations, including as regards the processing of personal data related to a child.~~

Reason

This is the first in a long series of Articles intended to give the Commission regulatory power to develop various aspects of the Regulation through delegated acts. We think the excessive use made of this regulatory approach throughout the instrument needs to be reconsidered, and the Commission's powers limited strictly to developing non-essential aspects of the Regulation. In the specific case of Article 6(5), we think the limits of delegated legislation are overstepped, and the Commission is given a legislative power without foundation in primary law.

Article 7

Amendment 9

Paragraph 2

2. If the data subject's consent is to be given in the context of a written declaration which also concerns another matter, the requirement to give consent must ~~be presented in~~ **take a form clearly** distinguishable in its appearance from this other matter.

Reason

We propose adding the expression "clearly" to this provision so as to bring out the need not merely for a formal separation between the consent and the rest of the declaration but also for the part intended to register consent to be clear and readily identifiable.

Article 8

Amendment 10

Paragraph 3

~~3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the methods to obtain verifiable consent referred to in paragraph 1. In doing so, the Commission shall consider specific measures for micro, small and medium-sized enterprises.~~

Reason

This rule gives the Commission powers that go beyond what is appropriate for delegated acts, giving it in fact a legislative capacity in aspects which are essential aspects of the Regulation. We therefore propose that this paragraph 3 be deleted, and that the points referred to in it be regulated in the body of the Regulation.

Article 9

Amendment 11

Paragraph 2 (f)

(f) processing is necessary for the establishment, exercise or defence of legal claims **of any kind**;

Reason

To emphasise the idea that the restrictions on processing sensitive data legally established in paragraph 1 do not apply when what is involved is the establishment, exercise or defence of a right by judicial means; with the aim of removing any doubt whatsoever as to whether or not a given judicial procedure is included.

Amendment 12

Paragraph 2 (i)

(i) processing is necessary for historical, statistical or scientific research purposes **or for preliminary official or administrative investigation to determine biological parentage,** subject to the conditions and safeguards referred to in Article 83; or

Reason

To provide legal instruments for an appropriate response to the social issue of the stolen babies which has arisen in Spain and could do so in any other country.

In such cases, many of those affected can probably no longer hope for a criminal-law response to their problems. In fact when this type of case is discovered, often a long time has passed since the crimes occurred, and the time limit for prosecution may well have passed. In such cases, what is requested is access to archives of civil status records, public and private hospitals, provincial governments and infant homes, to find the information and move forward with drawing conclusions.

The issue therefore is that of responding to a legal and social situation which is poorly served by the standard framework of civil and criminal court actions, consisting in the legitimate wish to find out the origin of the person and thus his or her identity, family and the effective exercise of civil and economic rights.

Amendment 13

Paragraph 3

~~3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria, conditions and appropriate safeguards for the processing of the special categories of personal data referred to in paragraph 1 and the exemptions laid down in paragraph 2.~~

Reason

We understand that this legislative delegation also exceeds the actual limits of this kind of act, insofar as it affects essential elements of the rule it seeks to develop. We therefore propose that it be deleted and that the appropriate conditions and safeguards for the processing of the special categories of personal data referred to in Article 1 and the exceptions laid down in Article 2 be dealt with in the body of the Regulation.

Amendment 14

Likewise, and in direct relation to the amendments to Article 9(2), we propose the following changes to Article 83 so that it remains sufficiently consistent with the above-mentioned amendments.

Article 83

Processing for historical, statistical and scientific research purposes

1. Within the limits of this Regulation, personal data may be processed for historical, statistical or scientific research purposes**, or for the purposes of a preliminary official or administrative investigation to determine biological parentage,** only if:

   (a) these purposes cannot be otherwise fulfilled by processing data which does not permit or not any longer permit the identification of the data subject;

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

2. Bodies conducting historical, statistical or scientific research may publish or otherwise publicly disclose personal data only if:

(a) the data subject has given consent, subject to the conditions laid down in Article 7;

(b) the publication of personal data is necessary to present research findings or to facilitate research insofar as the interests or the fundamental rights or freedoms of the data subject do not override these interests; or

(c) the data subject has made the data public.

The personal data being processed in the context of a preliminary official or administrative investigation to determine biological parentage shall only be communicated to data subjects when appropriate and without prejudice to the lodging of a criminal complaint if legal provision is made therefor.

3. ~~The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the processing of personal data for the purposes referred to in paragraph 1 and 2 as well as any necessary limitations on the rights of information to and access by the data subject and detailing the conditions and safeguards for the rights of the data subject under these circumstances.~~

Reason

The amendment to paragraph 1 aims to provide the necessary consistency between the proposed amendment to Article 9(2)(i) and Article 83. Even if the latter is not included within Chapters I and II of the proposal which are now subject to comments, the necessary interrelationship between the two provisions makes it necessary to set out here the proposed amendments in full.

As for the final subparagraph added to paragraph 2, this strengthens the guarantee that sensitive data for the preliminary official or administrative investigation to determine biological parentage is supplied to data subjects only on the basis of a legal reason and with the necessary safeguards.

With regard to paragraph 3, the rule as worded confers on the Commission legislative powers in essential aspects of the Regulation, therefore exceeding the limits of delegated acts. The issues to which this rule refers should be provided for in the text of the Regulation itself.

FRANCE

I. General comments on the proposal for a Regulation

The French delegation believes that the systematic recourse to delegated acts and implementing acts[1] is excessive in the proposals for a Regulation and a Directive, and shows that these two proposals are incomplete. In many instances, appropriate adjustments could in fact be added to the actual text of the articles without there being any need to delegate power to the European Commission to adopt delegated or implementing acts subsequently. In addition, the further sharing of sovereignty that the committee procedure entails is liable to generate opposition in our Parliament on these issues.

As regards the requirement for a law to create a filing system, the French delegation believes that it is unacceptable that the proposals for the Regulation and the Directive impose on Member States the form of national legislative measures to be adopted to implement their European obligations. Accordingly, the reference to "a law" needs to be replaced by a more general reference to "law". The French delegation is absolutely opposed to its being denied choice in the type of national legislative measures to be adopted, whether this be a law or a regulation.

As regards territorial and material scope, the French delegation would question the rather excessive extension of these, compared to the scope of Directive 95/46.

Thus, as regards material scope, the definitions of "data subject" and "processing of data", when taken together, extend the scope of the instrument considerably.

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[1] For the record, delegated acts may only refer to non-essential elements in the provisions in which they are provided for and have to be adopted, but leave the Commission, which is the only body which can draft and adopt them with very considerable powers of discretion. However, implementing acts are used to implement provisions they relate to and are drawn up using the "conventional" committee procedure, with recourse to a committee of experts.

As regards territorial scope, and in particular the "main establishment" criterion, the French delegation has strong reservations regarding the application of this criterion, which would put a greater distance between the citizen whose data is at issue and the competent data protection authority. It is particularly important that individuals resident in France should be able to contact the CNIL to obtain redress for damage caused by controllers whose main establishment is in another EU Member State. The Commission's draft Regulation would prohibit this. Making EU citizens' rights more effective means making it easier for citizens to exercise the right to complain to data protection authorities.

In addition, even though the Regulation does make for greater harmonisation, there is still a real risk of forum shopping as a result of the criterion of the country of the main establishment, since the disparity in the implementation of personal data protection in Europe is due at least as much to the differences in law between Member States as to the different approaches taken by national data protection authorities, some of which can be particularly flexible.

Of course, the French delegation recognises that the national authority of the place of the main establishment may be better placed both to examine the formalities carried out by a controller prior to a processing operation and to enforce the sanctions imposed on controllers who are at fault. However, it believes that the national authority where the citizens concerned are resident should be the only competent authority to receive, examine and adjudicate on complaints.

In addition, the territorial scope of the Regulation does not cover cases where data is processed outside the European Union, even though the controller may be in the European Union (for instance, where the processor is located outside the European Union).

As regards simplification of administrative tasks, which is a Regulation objective supported by the French delegation, the various provisions of the proposal go too far in reducing the obligations on enterprises, particularly in respect of formalities to be completed prior to processing operations. Indeed, in its current wording, the proposal for a Regulation effectively removes the requirement for notification of processing operations to the data protection authority, and provides for supervision and evaluation of processing operations by the controllers themselves. The French delegation believes that the data protection authority should know who all the controllers are, in particular so as to ensure effective downstream supervision, once the processing of data has begun.

Equally, as regards impact assessments, the French delegation has reservations for two reasons:
- the criterion of the size of the controller enterprise (more than 250 employees) selected as a cut-off point for the obligation to carry out the impact assessment is not workable, as information on the size of enterprises is not available outside the realm of statistics.
- these impact assessments would be carried out by controllers themselves and would only concern processing operations presenting specific risks to the rights and freedoms of the data subjects. However, the Regulation contains no details on the assessment of risks arising from a processing operation. Some processing operations would therefore be exempt from the obligation to notify the supervisory authority.

Conversely, the obligation to document all processing operations seems to be incompatible with the aim of reducing the administrative burden on controllers.

The French delegation is therefore more in favour of the Regulation taking an approach based on degree of risk.

The Regulation does not make any provision, either, in respect of response times for supervisory authorities, or is too imprecise on notification procedures.

As regards the right to be forgotten, as established by the Regulation, the French delegation wonders about the implementation of this right in respect of social networking, since it would appear that the Regulation does not make any provision for personal data published by third parties. The French delegation is also concerned about the provisions on the right to erasure of such data: are the data actually erased or does erasure cover only the access path to the data?

As regards the right to data portability, also established by the Regulation, the French delegation needs more information to understand how this provision can be implemented in practice and the links between this right and intellectual property law. In particular, the French delegation wonders how this new right fits in with Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases, and the possible conflict between the right to data portability and the fact that Directive 96/9/EC provides that the maker of a database cannot be compelled to transfer a substantial part of that database to a third party.

Lastly, the French delegation wishes to enter a scrutiny reservation on data transfers for taxation purposes. On this issue, it considers that it is important that European law on the protection of individuals with regard to the processing of personal data does not prevent effective administrative cooperation in the field of taxation and complies with the existing law and standards in the area, whether in European law or bilateral agreements concluded by Member States using the model developed by the OECD.

II. Comments by the French delegation on the proposal for a Regulation, article by article

Article 1 - Objectives

In paragraph 3, the statement that the free movement of personal data within the Union must be neither restricted nor prohibited for reasons connected with the protection of individuals with regard to the processing of personal data seems to us to be ambiguous. We believe that it would be simpler just to state the Union's commitment to the free movement of data in the recitals.

Article 2 - Material scope

This Article is linked to the definitions in Article 4.

In paragraph 1, the French delegation is unsure about the meaning of *"the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system"* and in particular it wonders whether filing in professional archives, in enterprises as well as administrations, is included in the scope of the Regulation.

In paragraph 2(a) the French delegation would like it to be specified that the concept of *"national security"* does indeed cover the concepts of *"defence"* and *"State security"* which are the terms used in Directive 95/46/EC.

Regarding paragraph 2(b), the French delegation would also like it to be specified whether the Regulation applies to transfers from the Member States to the institutions.

In paragraph 2(e), the French delegation asks that the *"competent authorities"* concerned be specified, to make a clearer link between the scope of the Regulation and that of the Directive. Similarly, in the proposal for a Directive, it will be necessary to specify what is covered by *"competent authorities"*.

- In paragraph 3, it is important that the draft Regulation should be fully in step with the terms of the e-commerce Directive, Directive 2000/31/EC, and particularly with the rules in force on the liability of intermediary service providers (Articles 12 to 15 of Directive 2000/31/EC). Web 2.0, which did not exist when Directive 95/46/EC was adopted, is now the main motor for growth in the provision of services by intermediaries to all citizens, consumers and economic operators, which has made possible the exponential spread of the benefits of the internet. Users of these services, when they are themselves responsible for the processing of personal data, must be considered as solely answerable for their activity in this area. Intermediaries should therefore be protected from any direct liability as regards the processing of data by their users, and should continue to be able to provide their services as freely and broadly as possible. The interaction between the e-commerce Directive and data protection legislation guarantees this balance of liabilities and must be preserved.

- Furthermore, the French delegation is not sure that *"Business to Business"*(B2B) transactions are covered by the proposal for a Regulation as it stands at present. Since the French authorities are currently considering this question, we would like to enter a scrutiny reservation on this paragraph, and invite the European Commission to provide some clarification on this point.

Article 3 - Territorial scope

In paragraph 2, the French delegation believes that points (a) and (b) are a source of ambiguity and would need to be explained.

As they stand, we would therefore like them to be deleted (*"This Regulation applies to the processing of personal data of data subjects residing in the Union by a controller not established in the Union~~, where the processing activities are related to:~~*

~~(a) the offering of goods or services to such data subjects in the Union; or~~

~~(b) the monitoring of their behaviour.")~~

The French delegation thinks that legal certainty would be strengthened if the draft simply contained a dual criterion of territorial application: either the processing is carried out in the context of activities in the territory of the Union (i.e. paragraph 1, unchanged), or it concerns persons residing in the territory of the Union.

Article 4 – Definitions

In general, the French delegation considers that the definitions in point (1) (*"data subject")* and point (2) (*"personal data"*) are not appropriate, insofar as it is the data which has to be *"identifying"*. We would therefore like to reverse the presentation of these definitions in the Regulation, and to revert to the definitions in Directive 95/46/EC[1].

On point (1), which defines the *"data subject",* the French delegation wonders about the inclusion of natural persons who may be identified "***by means reasonably likely*** to be used by the controller or by any other natural or legal person".
This extension by comparison with Directive 95/46/EC is a source of legal uncertainty and would appear to be much too broad an extension of the scope, since the use which "any other natural or legal person" might make of information which would not be "identifying" for the controller himself would then have to be taken into account.
Also regarding point (1), we wonder about the *"factors specific to the (...) mental (...) identity of that person"* and would like an explanation of what this new concept covers.

In point (3) defining *"processing"*, the proposed definition is again very broad compared with that given in Directive 95/46/EC, insofar as the question of including new data processing operations, particularly video surveillance, now arises. Similarly, we are concerned about the inclusion of exchanges of professional emails concerning third parties in the scope of the definition of processing. We would therefore like to stress the risk of legal uncertainty stemming from this wording of the definition, since what is involved here is the exact determination of the scope. Moreover, insofar as Article 28 of the Regulation obliges data controllers to document all processing operations, the extension of the definition of processing could prove contrary to the objective of simplifying matters for enterprises.

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1 *"personal data" shall mean 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 identification number or to one or more factors specific to his physical, psychological, mental, economic, cultural or social identity.*

On point (4), the definition of *"filing system"*, the French delegation wonders what is meant or covered by the concept of *"decentralized or dispersed on a functional or geographical basis"*.
On the concept of *"recipient"* in point (7), the definition used in the Regulation no longer includes the authorised *"third parties"* who appear in Directive 95/46/EC. The French delegation would like to emphasise that this concept is fundamental in the activity of bodies to which the law has given a right of "disclosure".
In fact, an authorised third party cannot be defined *a priori* as the recipient of a processing operation, since its access to the data is based on a legal text outside the processing operation (whether before or after the existence of that processing operation). For the same reasons, the obligations connected to the rights of data subjects cannot be imposed on the controller. These rights would, moreover, often run contrary to the aim of the legislator when the right of disclosure was granted to the authorised third party.

In point (8), the definition of the data subject's consent should be made clearer: the terms *"any (...) indication of his or her wishes"* or *"clear affirmative action"* are too vague. In fact, the indication of wishes must be unequivocal, and it must be possible for it to be secured and recorded so that a trace of the indication of consent can be found after the event.

Furthermore, the French authorities are still analysing the links between this provision in particular and more generally the whole proposal for a Regulation, and the most recent Directive on privacy in the electronic communications sector (Directive 2009/136/EC), in particular as regards the issue of cookies. The French delegation would therefore like to enter a scrutiny reservation on this point.

In point (11) on the definition of *"biometric data"*, the French delegation wonders what is meant by the *"behavioural characteristics of an individual which allow their unique identification"*.

On point (12), the definition of *"data concerning health"*, we note that the Regulation states the principle of prohibiting the collection of data concerning health, with a few exceptions. However, looking at recital 26, the concept of the "provision of health services" appears extremely broad. Perhaps not all data concerning the health of an individual need to be afforded the same degree of protection.

On point (13), on the definition of the main establishment, the French delegation would repeat the preliminary observations made above, and refer to the specific annex on this point below.

In point (19), concerning the definition of *"supervisory authority"*, the French delegation would like the adjective *"independent"* to be added before *"public authority"*.

Finally, insofar as several articles in the Regulation refer to the concept of *"specific risks"* presented by processing operations (for example, they appear in Article 33 as criteria triggering the obligation for controllers to carry out impact assessments), Article 4 should contain an additional definition of *"processing operations presenting specific risks"*.

Article 5 - Principles relating to personal data processing

In point (e), the French delegation has noticed a probable flaw in the French translation and would like the expression *"recherche (...) statistique"* to be changed, so as not to distort the meaning of the article. We therefore propose the insertion of the noun *"production"* before the qualifier *"statistique",* and would emphasise that this request applies to every occurrence of this expression in the Regulation.

In point (f), the French delegation welcomes the principle of the liability of the controller. However, the obligation on the controller to demonstrate compliance is too general and imprecise and could create an excessive liability regime, which would be contrary to the Regulation's the aim of reducing the administrative burden on enterprises.

Article 6 - Lawfulness of processing

On point (f) of paragraph 1, the French delegation would like to enter a scrutiny reservation on the criterion of *"legitimate interests"* as grounds for the lawfulness of a data processing operation without the consent of the data subject.

Article 7 - Conditions for consent

Regarding paragraph 4, the French delegation finds that this Article, which it considers to be particularly useful, could be expanded as follows: *"Consent shall not provide a legal basis for the processing, where there is a significant imbalance between the position of the data subject and the controller,* ***and must be replaced by another legal basis such as those provided for in Article 6(a) and (b)"***, so as to provide explicitly for the arrangements for consent in cases where there is a significant imbalance between the person giving consent and the controller, for example in the case of sportsmen, who are by definition always in a situation of inferiority vis-à-vis competition organisers, whether national or international.

Article 8 - Processing of personal data of a child

In paragraph 1, the French delegation has doubts about the threshold of 13 years. We would like the minors concerned by this provision to be covered until the age of 18, so that processing of data relating to all minors is subject to parental consent.

Also regarding paragraph (1), obliging the controller to retain proof that consent has been obtained from *"the child's parent or custodian"* is a source of ambiguity, insofar as Article 7 places the burden of proof on the controller.

In paragraph 3, the French delegation would point out that the criterion of the size of an enterprise risks giving rise to major difficulties of application, since this information is not available outside the realm of statistics.

Article 9 - Processing of special categories of personal data

In paragraph 1, the French delegation would like the concept of *"belief"*, which is much too broad and imprecise, to be strictly defined or deleted. We propose a return to the current wording of Directive 95/46/EC.

In the same paragraph, concerning processing operations relating to *"criminal convictions or related security measures"*, which were covered by a different regime than other "sensitive" data in Directive 95/46/EC[1], the French delegation would like the distinction made in that Directive to be reproduced in the Regulation. We also wonder about the disappearance from this paragraph of the Regulation of *"offences"*, which were included in the scope of that separate regime in Directive 95/46/EC. We would therefore like it to be reintroduced.

In paragraph 2, the French delegation would like to enter a scrutiny reservation on point (a) on the exemption from the prohibition on processing of sensitive data where the data subject has given his consent.

In the same paragraph, in point (j) concerning processing operations *"relating to criminal convictions or related security measures"*, the obligation for the complete register of criminal convictions to be kept only under the control of official authority must be limited to certain persons within the authority, given the sensitivity of the data.

Article 10 - Processing not allowing identification

The French delegation would like to enter a scrutiny reservation on this Article.
If a processing operation contains data which does not permit identification, it should not be regarded as a processing operation within the scope of the Regulation. However, we are concerned that this Article covers certain complicated situations from the world of digital data, for example the problem of IP (Internet protocol) data, or the question of the cross-referencing or alignment of databases.

[1] Article 8 of Directive 95/46/EC: " 5. *Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority."*

IRELAND

Chapters 1 and 2 (Articles 1 to 10)

Article 1 (Subject matter and objectives)

1. Paragraph 2 appears to confer enhanced status on data protection rights *vis-à-vis* other fundamental rights, many of which are guaranteed in Member States' constitutions, e.g. the right to freedom of expression. This is likely to lead to difficulties in future litigation. Since the content of paragraph 2 is contentious but not essential, it should be dropped.

2. Paragraph 3 appears not to permit any exceptions to the 'free movement' rule even though certain processing operations are clearly outside the scope of the Regulation, e.g. article 2.2(a) exceptions. This needs to be clarified.

Article 2 (Material scope)

3. In paragraph 2(a), it is not clear if the exemption for 'national security' – not defined – is intended to include 'defence' and 'public security' which are referred to in article 13.1(b) and (c) of Directive 95/46.

4. The scope of the so-called 'household exemption in paragraph 2(d) is also unclear. Recital 15 appears to indicate that any connection with professional or commercial activity would amount to a 'gainful interest' and the exemption would no longer apply. Moreover, the ECJ ruling in C-101/01 ('Lindqvist') appears not to have been taken into account. The utmost clarity is required in relation to this exemption.

Article 3 (Territorial scope)

5. Paragraph 2(b) appears to mean that a controller who monitors the behaviour of a data subject who is normally resident in the Union while that individual is outside the territory of the Union will be subject to the Regulation [the words "in the Union" appear in subparagraph (a) but not in (b)]. Is this intentional? Is such a provision enforceable?

6. The extent to which the public authorities of Third Countries are subject to the Regulation also needs to be clarified.

Article 4 (Definitions)

7. The extended scope of the definitions of 'data subject' lacks legal certainty; moreover, it takes no account of the intended purpose, context, circumstances or likely privacy impact of processing the personal data concerned. This appears to conflict with recitals 23 and 24 which recognise that context may be an important determinant of whether information is in fact personal data. More generally, it has not been sufficiently demonstrated that the existing definition of 'personal data' in article 2(a) of Directive 95/46 needs to be replaced.

8. Serious consideration must also be given to excluding personal data which has been anonymised, pseudonymised or encrypted from the scope of the Regulation; such an exclusion would appear to be consistent with the policy objective underlying article 10.

9. The requirement for 'explicit' data subject consent in all cases is far reaching and likely to be excessive to requirements in many cases, especially where non-sensitive data are processed. In particular, it may impact adversely on the general demand for internet services which are consumer-friendly, fast and efficient.

10. Requiring explicit consent in all cases may also trigger unintended consequences, e.g. a form of 'click fatigue' which may, perversely, lead consumers to endanger their personal data. It may also result in a reduced statistical base for companies relying on web analytics to achieve efficiency gains or to provide improved layout and content for users.

11. In the case of a processor, the definition of 'main establishment' refers to "the place of its central administration in the Union." However, this place may have no link with the place where the data are processed. It would be preferable to refer to the location of the processor's primary data processing centre; if this location lies outside the Union, the reference should be to the location in the Union where the main decisions are taken (as in the case of controllers).

Article 5 (Principles relating to personal data processing)

12. Clarification is required on whether these principles are directly applicable on controllers or may be implemented by means of national law (Commission made reference to ECJ ruling in Case 272/83 at the February meeting and appeared to concede that national law could be retained if it was consistent with the content of Regulation).

13. As regards 'purpose limitation', the first part of sub-paragraph (c) is acceptable; however, the second part ("they shall only …") is confusing and should be dropped. If considered useful, it could be clarified in a recital that where a purpose can be achieved without supporting personal data, such data should not be processed (the Commission cited the hypothetical example of an 'in-house' transport survey which did not require identification of employees).

14. The rule permitting further processing for "historical, statistical or scientific purposes" in article 6.1(b) of Directive 95/46 should be retained under the 'purpose limitation' rule in paragraph (c) rather than in paragraph (e).

15. In paragraph (d), the words "where necessary" should be retained (as in article 6.1(d) of Directive 95/46).

16. As regards paragraph (e), see paragraph 14 above; the limitation to research purposes is not justified and the word "research" should therefore be dropped.
17. In paragraph (f), it is not clear if the reference to "liability" is appropriate (liability issues are covered in article 77).

18. Also in sub-paragraph (f) the words "shall ensure and demonstrate" should be replaced by "shall ensure and <u>be able to</u> demonstrate".

Article 6 (Lawfulness of processing)

19. In paragraph 1(d) and recital 37, "vital interests" (i.e. plural) should be considered to include serious loss or damage to the data subject's property.

20. In the context of the 'legitimate interest' rule in paragraph 1(f), a specific exemption should be made for processing operations necessitated by network and information security; this is referred to in recital 39 but is sufficiently important to warrant an explicit exemption in article 6(1).

21. Also in relation to paragraph (f), the 'legitimate interest' rule should continue to be available to public authorities when performing their official duties; unlike civil law jurisdictions, the activities of public authorities in common law jurisdictions may be based on case law, custom and practice rather than statute or regulation.

22. Paragraph 2 repeats what has been stated earlier in article 5 and is not required here.

23. In paragraph 3, the second sentence ("The law …") appears to impose criteria on the enactment of national law; in doing so, inter alia, it conflicts with the provisions of article 52 (Scope and interpretation of rights and principles) of the Charter of Fundamental Rights. It is not appropriate in this context.

24. Paragraph 4 requires further explanation.

25. The proposal in paragraph 5 that the Commission be empowered to impose specific conditions in respect of the legitimate interests rule "for various sectors and data processing situations" is far reaching and will create uncertainty and is therefore undesirable. This paragraph, together with other proposals for 'delegated acts' throughout the text, needs to be examined separately in the context of article 86.

Article 7 (Conditions for consent)

26. While paragraph 1 places the burden of proof on the controller, is remains unclear what form of evidence of consent is required. The burdens imposed on controllers must be reasonable and proportionate.

27. As regards withdrawal of consent (paragraph 3), does such withdrawal trigger erasure of the data? The manner of withdrawal must be clearly specified. The implications of the 'without detriment' reference in recital 33 are also unclear and need to be clarified.

28. The 'significant imbalance' test in paragraph 4 is vague and will create legal uncertainty; this uncertainty is not acceptable in the context of potentially large sanctions for infringements.

Article 8 (Processing of personal data of a child)

29. The inclusion of a definition of 'information society services' would help to clarify the scope of the article.

30. The intended scope of this article and its relationship with the general processing rules in article 6 need to be clarified.

Article 9 (Processing of special categories of personal data)

31. In paragraph 1, the reference to 'beliefs' is too vague to be meaningful.

32. As regards paragraph 3, see comments in paragraph 5 above.

Article 10 (Processing not allowing identification)

This needs to be clarified. Exclusion from the scope of the Regulation of personal data which have been anonymised and pseudonymised could encourage the development of business models with enhanced data protection and privacy characteristics.

CYPRUS

Article 2
Material Scope

(d) (15)
The wording of preamble paragraph (15) is confusing. The first sentense provides an exception. The second sentense should read either "The Regulation should also not apply to..." or, alternatively, "The exception should also apply to..

Article 3
Territorial Scope

2.
This Regulation applies to the processing of personal data of data subjects residing in the Union by a controller or a processor not established in the Union, particularly where the processing activities are related to:

2(a)
The COM has on occasions stressed that in the new digital era personal data is the new hard currency. Often websites providing free on line services collect visitors' data, which they sell to advertisers, indirectly making a profit out of it. The preamble should clearly explain that the offering of such services, irrespective of whether connected to the payment of a price by the data subject, falls within the scope of the Regulation, if it results, directly or indirectly to the financial profit of the controller.

Article 4
Definitions

(1)
To avoid legal uncertainties the COM should clarify if the Regulation applies only to living persons or to deceased persons aswell.

(6)

In view of several uncertainties that arose from the Directive 95/46/EC the COM should clarify if an employee can be appointed as a processor

(7)

The elimination of the recital "*authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients;*" may result to legal uncertainties relating to the controllers' obligation to inform data subjects for the communication of their data to law enforcement authorities in the course of investigations against them and may as well undermine the course of the investigations

(10)

'genetic data' means all data, of whatever type, concerning the hereditary characteristics of an individual or characterisics acquired during early prenatal development;

(11)

'biometric data' means any data relating to the physical, biological, physiological or behavioural characteristics of an individual which allow his her unique identification, such as facial images, or dactyloscopic data;

(14)

representative' means any natural or legal person established in the Union who, explicitly designated by the controller, acts and may be addressed by any supervisory authority, data subject and other bodies in the Union instead of the controller, with regard to the obligations of the controller under this Regulation;

It is to our understanding that the concept of one stop shop should be applicable both to controllers and data subjects. We see no reason why data subjects should not be able to address the controller's representative form matters relating to the controller's obligations, particularly for reasons relating to their exercise of rights

(18)

The COM should take into consideration the concerns expressed by several MS at DAPIX regarding the age of 18 being the threshold.

Article 5
Principles relating to personal data processing

To avoid any legal uncertainties as regards who is responsible to apply the principles provided for in subsections 4(a) to (e), we would prefer to see the same numbering as in Directive 95/46/EC. Subsections 4(a) to (e) should be under section 4(1) and subsection 4(f) should be renumbered to section 4(2).
In addition, we would like to see the principle of accountability introduced in subsection 4(f)-proposed article 4(2).

Article 6
Lawfulness of processing

(f)
In response to questions posed by CY and other MS regarding the rational for the omission of a third party's legitimate interest as legal basis for the disclosure of data, the COM explained, as we have understood, that upon the receipt of the data the third party becomes "another" controller and thus it is no longer necessary to refer to third parties. This position however is rather confusing, particularly as regards Regulation Art.19 (Right to object), in cases where a controller communicates data to "another" controller. The COM should clarify how the right to object should be exercised in such cases.

3.
Although we understand the COM's attempt to avoid broad interpretations of the terms "*public interest*" and "*official authority*", as was often the case with the Directive, we share the concerns expressed by several MS that in many cases public interest cannot be determined by virtue of law. The COM should find a more clear way to limit broad interpretations of the term "public interest".

Article 7
Conditions for consent

1.
Why did the COM choose the word "*specified*" instead of the word "specific"? What legal implications derive from this difference? How does the term "*specified*" relate to "*one or more specific purposes*" refer to in article 6(1)(a)?

Article 8

Processing of personal data of a child

1.

Information society services already have too much information that children provide freely. What they do not have is information about their parents. Our main concern is that we may end up allowing these services lawfully collect parents' data for the sake of protecting their children. Although we welcome the COM's effort to protect children, we should be very cautious on the approach we should choose, taking into account that, it is often the case, that children at the age of 12, 13 are more technologically dexterous than their parents.

Since the protection of children should extend to the non digital environment, we propose the following wording:

"*For the purposes of this Regulation and particularly in relation to the offering of information society services directly to a child...*".

Article 9

Processing of special categories of personal data

See comment on article 9(2)(d) as regards philosophical aims.

(d)

The COM chose to omit from Article 9(1) the word "*philosophical*". Yet, Article 9(2)(d) allows for derogations on the basis of philosophical aims.

(g)

In various contexts in the text reference is made to "*appropriate safeguards*", "*adequate safeguards*" and to "*Union law, or Member State law which shall provide for suitable measures*". To avoid legal uncertainties, the COM should be more precise as to what, each reference implies.

LATVIA

Latvia expresses its gratitude for the opportunity to provide comments and proposals for the 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 (hereinafter - Regulation). Latvia welcomes the input in developing a common framework for the data protection in the European Union (hereinafter - EU) thereby creating a modern, strict, consistent and comprehensive data protection framework in the EU.

Latvia expresses proposals and comments on the Regulation regarding the Chapter I and II:

1. Latvia notes that the Article 2 paragraph 3 provides an exception in respect of Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). Identical wording is also specified in the paragraph 17 of the preamble of the Regulation. Consequently, in order to understand whether those rules are needed to be defined as an exception with regard to the material scope of Regulation, it is necessary to supplement the preamble by explaining the need for such an exception. On the other hand, if the rule is declarative rule that explains the material scope of Regulation, Latvia proposes to delete the Article 2 paragraph 3.

2. In the context of Article 3, namely as regards term “establishment” provided in the framework of the mentioned Article, Latvia would like to draw attention that further discussion is necessary in order to decide whether meaning of “establishment” is equally understood by all the member states. Common understanding is important as meaning of “establishment” is directly linked with the scope of application of the Regulation. The same discussion is necessary as regards meaning of the subparagraph (a) and (b) of the Article 3 paragraph 2.

3. Latvia offers to define more precisely the Article 4 paragraph 7(the definition of "recipient") with a purpose to state clearly that recipient is natural or legal person that is not controller, processor and data subject:
   "(7) 'recipient' means a natural or legal person, public authority, agency or any other body to which the personal data are disclosed except controller, processor and data subject;"

4. Latvia proposes to clarify the Article 4 paragraph 9 (definition of "personal data breach") by deleting the word "security". The above mentioned amendment is necessary as the personal data breach will not always be the breach of security. Taking into account the above mentioned Latvia indicates that the definition of personal data breach is wider than a breach of the security.

5. Latvia would like to ask for the further explanation regarding the age limit of a child mentioned in Article 8 that defines that for the purposes of this Regulation in relation to the offering of information society services directly to a child, the processing of personal data of a child below the age of 13 years shall only be lawful if and to the extent that consent is given or authorised by the child's parent or custodian.

At the same time Latvia would like to express general comments in the context of Regulation:

In the framework of Regulation large-scale exceptions are made regarding the term „public interests". For the example, Article 9 paragraph 2 subparagraph (g) provides that processing is necessary for the performance of a task carried out in the public interest, on the basis of Union law, or Member State law which shall provide for suitable measures to safeguard the data subject's legitimate interests. Article 17 paragraph 5 defines that personal data may, with the exception of storage, only be processed for purposes of proof, or with the data subject's consent, or for the protection of the rights of another natural or legal person or for an objective of public interest. Latvia proposes to define criteria in the preamble with the aim to limit the meaning of the definition "public interests". These criteria are necessary in order to ensure unitary interpretation of the Regulation within the member states.

Regulation provides that the Commission has wide powers to adopt delegated acts not only in technical issues but also to address the issues that significantly affect the application of the Regulation. Taking into account the above mentioned as well as the fact that a number of issues in Latvia's view are essential for the Member States it is necesary to examine the need to adopt delegated acts in such articles 6, 8, 13, 17, 19, 20, 23, 35, 44 and article 82. Latvia would like to draw an attention points that delegated acts can be adopted in issues relating to technical things rather than in issues in which Member States may have a different approach and legislation.

Latvia would like to draw an attention to the fact that the Commission shall take into account the status of micro, small and medium-sized enterprises. In the opinion of Latvia all the natural or legal persons must ensure the data protection requirements irrespective of size. If specific requirements are established, characteristic and amount should be taken into account. At the same time in practice small and medium-sized enterprises can handle larger amounts of data than large enterprises. Consequently Latvia stresses that number of employees (250), when the controller and the processor shall designate a data protection officer is not appropriate criteria. Therefore Latvia proposes that as a criteria should be foreseen the amount of data being processed rather than number of employees that would reflect the impact on data protection

In regulation there is no rules regarding the conditions and procedures of video surveillance. It is necessary to provide the above mentioned in the framework of Regulation with the aim to lay down the rights and obligations of the controller and data subject. Latvia stresses that current wording of the Regulation with rhe ragard to the video surveillance provides unequal relationship between the data subject and controller, namely, for the controller it will be difficult to prove that the data subject has given explicit consent to the processing of his data in accordance with the Regulation.

With the aim to prescribe unitary application of the Regulation regarding the rights to erasure it is necessary to supplement the Regulation with rules that define if and how long data controller has the rights to store backups. In addition Latvia suggests to improve the Regulation with rules how the data subject can enforce rights when the controller does not exist, is missing, cannot be identified or is unreachable.

LUXEMBOURG

These comments are without prejudice to any further comments made in subsequent negotiations.

General remarks

- Luxembourg **supports the goal for creating a harmonized set of rules** for personal data protection across the internal market to remedy current fragmentation and increase legal security. Luxembourg underlines the necessary double objective of the legal base, article 16 TFEU: the protection of the fundamental right to data protection and the guarantee of the free movement of personal data in the EU.

  Luxembourg would also like to recall the November 2011 CJEU judgment in the joint cases C-468/10 and C-469/10 stating that already Directive 95/46 precludes Member States from providing additional conditions for the processing of personal data and that it has direct effect. The harmonisation of national laws by way of the Directive is not limited to minimal harmonisation, and the proposed Regulation unequivocally sustains and reinforces this objective.

- Luxembourg **supports the choice of legal instrument**: a regulation, being directly applicable in all 27 Member States, will allow for a uniform application of EU data protection rules thereby guaranteeing the same high level of protection to all EU citizens and provide the necessary legal certainty for controllers.

- Luxembourg supports the creation of a **one-stop-shop**, which creates a win-win situation for both EU citizens and businesses: citizens will continue to be able to address their national DPA, and businesses will have one single competent DPA based on the country of origin principle. This system is the logical corollary of a uniform set of rules to be applied across the EU.

- Luxembourg underlines the necessity of a **technologically neutral regulation** in order to ensure the future-proof character of legislation, to encourage innovation and not to close the door on new technological developments.

- At the same time, it is important to take into account the development of **cloud computing** services which can take different forms (infrastructures as a service, software as a service etc).

- For Luxembourg, it is of utmost importance that the future EU regulatory framework provides a maximum of **legal certainty**. It is only with clear and simple rules that the level of protection of personal data increases, rules known and understood by all concerned – data controllers and data subjects. A clear and predictive legal framework also avoids the risk of non-conformity of controllers, and even potential relocation by businesses outside the EU due to perceived competitive disadvantages at a global level.

- Luxembourg believes that the proposed regulation should provide a maximum of legal certainty and is not convinced that the high number of **delegated acts** is justified in each case. In conformity with the Treaty, only non-essential elements of the regulation may be supplemented.

- Luxembourg underlines the necessity of a clear articulation of the proposed Regulation with the existing **ePrivacy directive** and other sectoral EU legislation.

- For the sake of legal certainty and avoid ambiguity in interpretation, Luxembourg also underlines the need of coherence between recitals and articles.

Detailed comments/questions

- Art 2 (2) (d): The notion "gainful interest" needs to be clarified: limiting the notion to a commercial profit may be too limitative.

- Art 2(3): Luxembourg supports the reference to the e-Commerce directive which creates clarity as to the liability regime of Internet intermediaries.

- Art 4 – Definitions

  (1) and (2): The proposed definitions seem too wide and ill-adapted to the digital environment. There is a risk to discourage free movement of data by creating disproportionate burdens. The definition is incoherent with the relevant recital and creates legal uncertainty: when are certain types of data *not* considered personal (cf online identifiers, location data)? A contextual approach may be more helpful and future-proof than a one-size-fits all approach.

  Luxembourg wonders about the compatibility of such a broad definition with Article 10.

  Luxembourg further suggests to delete "or by any other natural or legal person": this may by counterproductive by actually preventing controllers to resort to certain data protection measures such as anonymisation or encryption, as there is always some natural or legal person holding the key to decrypt. Anonymised or encrypted data hereby become personal data, contrary to the current legislation and practice.

  - (5) and (6): Broad support.
  - (8): This "explicit" nature of the consent seems too complex to implement and too disruptive an experience in an online environment. It is unclear whether this amounts to an "opt-in" (which would be unsuitable). Also, the "explicit" character doesn't necessarily improve the level of protection for the data subject or the "informed" character of consent. It may therefore be counterproductive by overwhelming data subjects with consent requests in an online environment. On the contrary, an explicit opt-in is only contributing to the legal protection of the data controller vis-à-vis the data subject.

    Further, it should be avoided that the inflexible ("explicit") manner in which consent is requested discourages innovative applications or models of giving consent, particularly in an online environment. Returning to the term "unambiguous" or taking a contextual approach seems more future-proof. *See also Art. 6 (4), Art 7, Art 9.*

    It is also unclear how this definition articulates with the cookies provision in the ePrivacy directive.
  - (9): For the sake of legal certainty, it is crucial to be coherent with the data breach provisions in the ePrivacy directive.

- (13): Luxembourg supports precise and clear definitions in order to avoid any ambiguity as to which single DPA is competent and dispel any doubt about jurisdiction. There is a need for more coherence with the recital.

- Art 5(b): It is important not to obstruct processing of personal data. Therefore it is important to clarify what constitutes "incompatible use" and "different purpose" – which may be a legitimate purpose.

- Art 5(c): Luxembourg supports the principle of data minimisation.

- Art 5 (d): Luxembourg regrets the deletion of "where necessary" which would be more future-proof .

- Art 5 (f): The expression "demonstrate compliance" should be interpreted as constituting an "obligation de moyen" and not an "obligation de résultat". It is unclear exactly what kind of « proof » is requested. « Each processing » seems a heavy burden.

- Art 6 (4) : It is important to clarify the difference between « different purposes » and « incompatible purposes ». According to Luxembourg, there is room for "accessory/ancillary purposes". Does this provision imply an "opt-in"?

- Art 6 (5): According to Luxembourg, this not a "non-essential" element of the regulation and it is therefore not justified for delegated acts (cf article 290 TFEU). Possibly, the delegated acts may be strictly limited to covering *only* the child (but not the legitimate interest).

- Art 7 (1): How can the controller prove that consent was "informed"? What impact does this provision have on the retention period of data if a controller needs to be able, at any time, to prove that informed consent was given?

- Art 7 (2): Luxembourg wonders if there is a difference between "another matter" and further processing of data for a different purpose?

- Art 7 (3): How can the data subject "withdraw his consent": does the "parallélisme des formes" apply (ie only in the same way that consent was given)?

- Art 7 (4): Luxembourg supports the basic idea behind this paragraph.

- Art 8 (1): The legal certainty seems undermined by having both a definition of a child below 18 years, and a provision about a child below 13 years? Luxembourg also wonders about the enforceability of these provisions: how do you ensure and prove that a data subject is *actually* of a given age or that consent has been given by a parent? Does this amount to an obligation to authenticate the consent of parents?

- Art 8 (4): This provision seems not necessary and a case of overregulation.

- Art 9 (2)(a): Luxembourg is worried about creating the same level of protection for "normal" personal data and for special categories of personal data: the type of consent requested is the same ("explicit") for both. It risks to devaluate the consent given for the processing of special categories of personal data and complicate the processing of regular personal data.

- Art 9(3): This article is already sufficiently detailed and there is no justification for delegated acts which contributes to legal uncertainty.

Art 10: Luxembourg strongly supports the necessity of this article

HUNGARY

The legislative instrument

I.

Hungary very much welcomes the Commission's proposal that endeavours to enhance the consistency of data protection legislation in the EU. Hungary agrees that a regulation may be a proper tool to achieve this goal as it is directly applicable in the Member States, thus providing with a higher level of legal certainty both for the data subjects and the data processors.

However it is worth taking into consideration that domestic data protection legislation in the Member States, besides the common principles stipulated in EU and international legal instruments, is based on divergent constitutional, historical, traditional precedents and approach.

A regulation lacks the flexibility a directive can provide for, thus while a directive – as indent (10) of the recital of Directive 95/46/EC currently affirms – leaves the room for Member States to guarantee a higher level of protection comparing to the minimum standards stipulated in EU law, a regulation by its very nature is much less flexible.

Hence, although recognising the advantages of a regulation Hungary fears that the cost of the compromise to adopt a regulation might inevitably be the lowering of the current data protection standards in some Member States, that is – as the protection of personal data is a fundamental right – unacceptable.

II.

Hungary does not see any substantial legal reason why the Commission's proposal does not manifest itself in a single legislative instrument that is applicable to every data processing operations falling into the competence of the European Union, including the area of police and criminal justice.

Hungary is of the opinion that Art 8 of the Charter of Fundamental Rights and Art 16 of the TFEU call for a comprehensive, consistent data protection framework that is applicable horizontally, providing with the same level of data protection throughout the Union.

Hungary notes and agrees the necessity of specific rules concerning the area of police and criminal justice. Nevertheless in Hungary's view these specific rules could be part of the very same instrument – be it a regulation or a directive – the generally applicable provisions are part of. No convincing legal argument is seen by Hungary that supports the Commission's proposal to regulate the data protection rules in diverging legal instruments, i.e. a regulation and a directive.

Chapter I

Scope

According to Article 2 (1) of the of the draft regulation the "*Regulation applies to the processing of personal data wholly or partly by automated means, and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system*".

Article 4 (4) defines a filing system as "any structured set of personal data which are accessible according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis".

In addition Article 4 (3) defines processing as "***any operation*** *or set of operations which is performed upon personal data or sets of personal data,* ***whether or not by automated means***".

Hungary doubts that either Art 8 of the Charter of Fundamental Rights or Art 16 of the TFEU may be interpreted so that data processing other than by automated means of personal data which **does not** form part of a filing system or are **not** intended to form part of a filing system is excluded of the scope of the EU-wide regulation concerning data protection.

The distinction of data processing by automated means and other means seems to run counter to the goal of a consistent data protection legislative framework. Being a fundamental right the protection of individuals with regard to the processing of personal data may not depend on the means by which this fundamental right might be infringed.

On the contrary: Hungary believes that the particular importance of data protection makes it inevitable to provide data subjects with the protection as universal and holistic as possible and that the principles of data protection shall apply regardless of the means of data processing.

Nevertheless, if circumstances concerning the various means of data processing make it necessary specific rules should be drafted to be applicable to automated and non-automated (manual) means of data processing operations.

Therefore Hungary suggests the following wording in Article 2 (1) of the draft regulation:

This Regulation applies to the processing of personal data ~~wholly or partly by automated means, and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system~~ irrespective of the means by which personal data are processed.

As a consequence Article 4 (3) should read as follows:

option Nr. 1

'processing' means any operation or set of operations which is performed upon personal data or sets of personal data, ~~whether or not by automated means,~~ such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, erasure or destruction;

option Nr. 2

'processing' means any operation or set of operations which is performed upon personal data or sets of personal data, ~~whether or not by automated means,~~ *irrespective of the means by which personal data are processed*, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, erasure or destruction;

Definitions

Article 4 (7)

Hungary is of the opinion that further clarification would be helpful regarding the definition of 'recipient' as the current definition may be interpreted so that a recipient may also be the data subject, the data controller or the data processor which persons should not be covered by the definition.

'recipient' means a natural or legal person, public authority, agency or any other body *other than the data subject, the data controller or the data processor* to which the personal data are disclosed;

Alternatively the definition of 'third party' may be added to the current set of definitions:

'recipient' means a ~~natural or legal person, public authority, agency or any other body~~ *third party* to which the personal data are disclosed; '*third party' means a natural or legal person, public authority, agency or any other body other than the data subject, the data controller or the data processor;*

Article 4 (8)

Hungary strongly supports the necessity of the definition 'the data subject's consent' and agrees the approach of the Commission regarding the wording, however in order to ensure legal certainty and to be in line with Article 7 of the draft regulation the possible forms of an explicit consent should be made clear.

Therefore a more suitable definition might be the following:

'the data subject's consent' means any freely given specific, informed and explicit indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action made in writing or by any other recorded means, signifies agreement to personal data relating to them being processed;

Article 4 (9)

The present definition of 'personal data breach' deals only with data security breaches however serious consequences may arise due to accidental or unlawful misconducts by the data controller or the data processor other than those relating to data security provisions. For example in Hungary's view it is not evident whether such a case is also covered according to the current wording when despite appropriate technical and organisational measures were implemented to protect personal data – thus data security provisions were fully met – the data processor processes personal data in a way incompatible with the legitimate purpose or processes personal data for a longer period than it would be legitimate.

Hence, Hungary suggests to draft a clear-cut definition so that it covers each and every incidents stemming from the breach of the provisions of the regulation and leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed.

'personal data breach' means a breach of ~~security~~ the provisions of this regulation leading to any unlawful operation or set of operations performed upon personal data such as the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed;

Chapter II

Lawfulness of processing

Article 6 (4) stipulates that in case of data processing for a purpose incompatible with the originally specified purpose the processing may be deemed lawful only if it is based on one of the grounds referred to in points (a) to (e) of Article 6 (1).

Hungary agrees the content of this provision however suggests supplementing it in order to explicitly prescribe the obligation of providing the data subject with information under the same conditions Article 14 currently provides for in other cases.

The necessary provisions should be drafted either in Article 6 (4) or in Article 14 (4).

option Nr. 1. Article 6 (4)

Where the purpose of further processing is not compatible with the one for which the personal data have been collected, the processing must have a legal basis at least in one of the grounds referred to in points (a) to (e) of paragraph 1. This shall in particular apply to any change of terms and general conditions of a contract. Where personal data relating to the data subject are processed under this provision the controller shall inform the data subject according to Article 14 before the time of or within a reasonable period after the commencement of the first operation or set of operations performed upon the personal data for the purpose of further processing not compatible with the one for which the personal data have been collected.

option Nr. 2 Article 14 (4)

The controller shall provide the information referred to in paragraphs 1, 2 and 3: (a) at the time when the personal data are obtained from the data subject; ~~or~~ (b) where the personal data are not collected from the data subject, at the time of the recording or within a reasonable period after the collection, having regard to the specific circumstances in which the data are collected or otherwise processed, or, if a disclosure to another recipient is envisaged, and at the latest when the data are first disclosed or (c) where the personal data are processed in cases referred to in Article 6 (4), before the time of or within a reasonable period after the commencement of the first operation or set of operations performed upon the personal data for the purpose of further processing not compatible with the one for which the personal data have been collected.

Conditions for consent

According to Article 7 (4) the data subject's consent to the processing of personal data "*shall not provide a legal basis for the processing, where there is a significant imbalance between the position of the data subject and the controller"*.

Although Hungary notes and supports the aim of this provision, i. e. that forced or pretended consent shall be qualified as an unlawful legal basis of data processing, also has serious reservations about the current wording as it seems to run counter to the very essence of the fundamental right to data protection: the informational self-determination of the data subject.

The current wording of Article 7 (4) makes it impossible to give a truly freely given consent to data processing in cases where the condition of a "significant imbalance between the position of the data subject and the controller" is *de facto* fulfilled, nevertheless the data processing serves only or primarily the data subjects' interest and they explicitly articulate their wish to have their personal data processed by the controller.

Article 7 (4) therefore should be fine-tuned in order to achieve the goal stated in indent (34) of the recital without limiting the data subject's right of informational self-determination.

As a starting point for the discussion on this matter Hungary advises to redraft the provision in the following way:

Without prejudice to the data subject's right to informational self-determination consent shall not provide a legal basis for the processing, where there is a significant imbalance between the position of the data subject and the controller.

Processing of personal data of a child

In relation to the offering of information society services directly to a child below the age of 13 years Article 8 sets out the condition for the lawfulness of the processing of personal data that consent is given – on behalf of the child as data subject – or authorised by the child's parent or custodian.

However Hungary recognises and supports the aim of this provision also considers that no justification is provided why the draft regulation limits the scope of this rule to the rather vague notion of 'information society services' only.

Another question arises concerning the age limit that triggers the application of Article 8. Hungary is of the opinion that further reasoning is needed – e.g. in the recital – what circumstances make the application of the special condition with regard to a consent of a child below the age of exactly 13 years justified, given the fact that according to Article 4 (18) 'child' means any person below the age of 18 years.

Therefore Hungary suggests deleting the text that limits the scope of Article 8 to the offering of information society services directly to a child.

For the purposes of this Regulation~~, in relation to the offering of information society services directly to a child,~~ the processing of personal data of a child below the age of 13 years shall only be lawful if and to the extent that consent is given or authorised by the child's parent or custodian. The controller shall make reasonable efforts to obtain verifiable consent, taking into consideration available technology.

Processing of special categories of personal data

Article 9 (2) determines the exceptions from the general prohibition for processing special categories of personal data.

Hungary believes that the exceptions stipulated in Article 9 (2) (d) are covered by those defined in Article 9 (2) (a), since data processing operations falling into the scope of Article 9 (2) (d) are based on the consent of the data subject, therefore Article 9 (2) (d) seems unnecessary and may be deleted.

~~processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed outside that body without the consent of the data subjects; or~~

Processing not allowing identification

Hungary has reservations about the current wording of Article 10.

In Hungary's view, given the presumption that '*the data processed by a controller do not permit the controller to identify a natural person*', such processing cannot be qualified as *personal* data processing, regarding the fact that the data subject is neither identified nor identifiable by the person processing such data. Therefore the person processing such 'impersonal data' cannot be deemed a 'controller'.

Hence, since in such a case the very conditions of personal data processing are not fulfilled, the question arises whether such a provision is necessary to be explicitly inserted into the draft regulation or it is obvious that processors of data relating to unidentifiable natural persons shall not have the obligations and rights of a 'controller', as it is defined in Article 4 (5).

POLAND

1. Provisions concerning the rights of the European Commission to issue delegated acts
(art. 6 par. 5, art. 8 par. 3, art. 9 par. 3, 12 par. 5, art. 14 par. 7, art. 15 par. 3, art. 17 par. 9, art. 30 par. 3, art. 31 par. 5, art. 32 par. 5, art. 33 par. 6, art. 34 par. 8, art. 35 par. 11, art. 37 par. 2, art. 39 par. 2, art. 43 par. 3, art. 44 par. 7, art. 79 par. 6, art. 81 par. 3, art. 82 par. 3 oraz art. 83 par. 3.)

In view of Poland the proposal contains too many references to issuance of delegated acts. Regulating so many aspects through delegated acts in currently unknown form impedes measureable assessment of detailed solutions by the EU Member States. For this reason Poland negatively assesses solutions included in the proposal, which constitute rather general basis for the future shape of the personal data protection system instead of coherent, seamless and in particular transparent regulation. In the opinion of Poland the optimal solution would be to clarify provisions included in the proposal to maximally restrict necessity of issuance of delegated acts by the European Commission. At the current stage of proceedings it should be examined which authorizations to issue delegated acts bear the most doubts.
Experience with national legislation in the field of personal data protection that is currently in force proves that there exist areas which require to be clarified and to ensure flexibility of regulation, therefore such a solution should not be absolutely rejected at the level of EU legislation.
In some cases Poland finds reasonable to leave appropriate rights to the European Commission (e.g.: impact assessment of the operation for data protection, data portability) but in the other ones we find it unacceptable (e.g.: art 6 par. 1 let. f in association with art. 6 par. 5, which allows the European Commission to define "legitimate interests" of data controller in specific data processing situations and in specific sectors – the other delegated acts concern substantial scope inter alia of these provisions. With a view of ensuring legal certainty such essential elements should be included in the regulation itself (in compliance with the Article 290 of the Treaty on Functioning of the European Union.).
It should be noticed that delegation of rights in the scope of statistics (art. 83), implicates doubts as to hierarchy of legal acts of the EU. Statistical issues is regulated by the regulation 223/2009, which is framework document resulting from Article 338 of the Treaty on Functioning of the European Union.

In this situation should planning of issuance of non-legislative acts concerning statistics result from the GDPR regulation which is legally based on the other Article of the Treaty on Functioning of the European Union? (there is an analogical situation in the article 5(e))

2. Provisions implicating doubts as to interpretation, that need to be clarified

It's of high importance to clarify basic definitions like: „personal data" (it's defined too widely and should not contain references personal data subject, moreover it should be thought over whether it's appropriate to define personal data through data subject) or "personal data breach".

Did the European Commission assess the impact of the extension of the definition of "personal data" on the way of conducting the telecommunication activity by telecommunication undertakings and the other activity on the internet?

3. Requirement to obtain the data subject's consent to direct marketing

It's necessary to deeply examine the impact of the detailed rules for personal data processing proposed by the European Commission on the conducting the activities on the Internet, business (also on the internet). taking into account of the proposal to obtain the data subject's consent to direct marketing (it's not clear whether the EC means the marketing in general sense or marketing for commercial purposes)

4. Conditions of further data processing on the basis art. 6 par. 4

This provision introduces the possibility of further data processing for purposes incompatible with initial purpose in cases, where we can find other legal basis (with exception of legally justified interest of the administrator)

Currently proposed provision opens the opportunity to further process data for inappropriate purposes in public as well as private sector. This provision is contrary to the general principle of restriction of the objective therefore Poland suggests to replace art. 6 par. 4 or to revise it and specify.

5. Restriction of the catalogue of sensitive personal data concerning decisions in the article 9 paragraph 1 through indication of criminal convictions or related security measures

Such a regulation will implicate that on the basis of new EU provisions sensitive personal data will not cover e.g.: data regarding decisions given in administrative proceedings (they belong to sensitive data according to the current Polish regulations), as well as decisions given in criminal proceedings, which are not criminal convictions, e.g.:. conditional closure of the case, preliminary custody.

Moreover the information on the crimes will not be included in this catalogue.

Independently on the above-mentioned aspect, due to the proposed legal form of the document (regulation) it seems that the term "related security measures" should be specified.

6. Processing of personal data of a child (art. 8 par. 1)

In view of Poland it's not absolutely clear, in what way should the service provider reliably identify a child. It seems that such a requirement imposed on the data controller can be impossible to meet in practice. There is also a doubt whether the data controller is empowered to verify documents of the parents of the child.

7. Too high sanctions for data controllers for non-compliance with this regulation (e.g. art. 13 and 79)

Applying such high sanctions can have a negative impact on the market development.

8. Impact of the obligations set out in the regulation on this part of the market where personal data processing on the internet is the basis for economic activity

New framework for personal data protection proposed by the European Commission, which finally should replace current general personal data protection set out in the Directive 95/46/WE, seem to regulate in far-reaching manner the rules of data processing on the new internet and telecommunication environment (vide: social networks, application of cookies, profiling, right to be forgotten etc.). From another side the provisions do not seem to take into account the impact of the obligations defined in the proposal on the rest of the market where personal data processing on the internet is not the basis for economic activity.

For example we should notice that all the entities processing personal data in the light of article 18 of the proposal (concerning the right to data portability) will have the obligation to make available a copy of data undergoing processing in an electronic format, which- alike technical standards, modalities and procedures – shall be specified by the European Commission through implementing acts. Independently on the above-mentioned aspect it should be noticed that referred obligation as a rule contrary to the objective of the designed regulation does not seem to increase the level of the personal data protection.

9. Doubts regarding the terms „zakład" i „siedziba"

New regulations will have an impact not only on the entities, that will use this protection but also impose a lot of obligations on the wide circle of data controllers.
Moreover they should guarantee legal certainty of free movement of data on the internal market.
The terms used in the article 3, article 4 item 13 (definitions) as well as recital 19 of the preamble were analyzed not only in terms of correct or incorrect translation of the text into Polish, but also in terms of possible impact of the proposed solutions on the national law.
This examination leads to the conclusion that the translator- probably- didn't manage to "catch" the correct sense of the terms: „zakład" i „siedziba" in Polish version of the proposal. Defining these terms in the most precise and correct manner requires even deeper legal examination.
It should be noticed that the term "zakład" applied in the Article 3 of the regulation (Polish version) – although applied in the Polish legal acts – does not have one, universal legal definition.

It's the most often used in the context of "workplace" („zakład pracy") in the Labour Code. It's present also in the other legal acts, inter alia: acts regarding environmental protection (as a one or a few installations with the area, to which operators have legal title, and facilities located on this area)

The CIT Act contains the term "foreign permanent establishment" which means inter alia fixed place through which the entity having its establishment or management on the territory of one state carries on the business wholly or partly on the territory of the other state, including in particular: a branch, a representative, an office, a factory, a workshop or a place of extraction of natural resources, but it can also mean construction site, manufacturing, or installation carried on in the other state by the entity having its establishment or management on the territory of the other state (…).

Definitions of the term „zakład" are included in the international agreements on avoidance of double taxation. Usually in these documents the term "zakład" is defined as fixed place, through which business is wholly and partly carried on.

Definition of the term „enterprise" we can find in the Civil Code- Article 551: The undertaking is an organized combination of tangible and intangible assets intended for business. It includes in particular: items from 1 to 9.
The way of setting out the geographical location of the main establishment of the international enterprise (having its owner in the EU or outside the EU), in compliance with the article 4 paragraph 13 and in recital 27 should be specified. For example dominating impact of one entity (establishment) on the data processing operations in reference to implementation of the provisions concerning personal data protection should be taken into account.
Article 4 contains a few definitions of economic operators, that distinctly differ from each other. The term "data controller" and "main establishment" from one side concern the location of decision-making on data processing, but - from the other side – definitions of "enterprise" and "group of undertakings" refers to the business and corporation structure.
Additional term is applied for processors with main establishment in place of its central administration.
The definitions overlap so as to they should be specified.
The meaning of the term „establishment" („siedziba") on the ground of the regulation crucial in particular while setting out such essential issue like territorial scope of application of the regulation (article 3 paragraph 2 and 3).

Particular caution should be kept while interpreting of this term due to the fact that "main establishment" – according to the official Polish version- is understood in the other manner than in the meaning of the provisions of the Civil Code, which define "establishment" ("siedziba") as the locality in which management body of the legal person is placed, unless the Act or the statute provides otherwise.

In the proposal for regulation the establishment is identified with the place "where the main decisions as to the purposes, conditions and means of the processing of personal data are taken; if no decisions as to the purposes, conditions and means of the processing of personal data are taken in the Union, the main establishment is the place where the main processing activities in the context of the activities of an establishment of a controller in the Union take place. As regards the processor, 'main establishment' means the place of its central administration in the Union."

Correct setting out of the place treated as the establishment is particularly important while identifying the appropriate supervisory authority, when processing of personal data take place in the context of the activities of data controller or processor established in the territory of the EU and data controller or processor conduct activities in more than one EU Member State.

Then the supervision over the activities of the data controller or processor is maintained by the supervisory authority of the main establishment of this data controller or processor (so called: one-stop-shop).

It means that while setting out the main establishment of the entity deciding on the territorial scope of application of the General Data Protection Regulation or the competence of the supervisory authority we should take into account criteria listed in this definition, instead of basing on the definitions from the civil law or commercial companies law, what can lead to doubts regarding interpretation of this term.

The sense of the Polish version of the recital 19 should be deliberated: "Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in this respect."

Above-mentioned issues concern compliance of the concerned regulation with the national law and impact assessment. It's necessary to explain and examine whether and in what way these terms were regulated in the EU law.

10. Scope of application of the regulation

This Regulation applies also to the processing of personal data of data subjects residing in the Union by a controller not established in the Union, where the processing activities are related to the offering of goods or services to such data subjects in the Union or the monitoring of their behaviour. Despite the proposal tries to define in recitals such terms like "the offering of goods or services to such data subjects" as well as "the monitoring of the behaviour of such data subjects" it would be helpful to more precisely explain these terms. It should be highlighted that "the offering of goods or services" covers also free of charge services (while persons in fact pay for the service providing their personal data). Moreover recital 21 suggests that "the monitoring of behavior" is associated with tracking on the internet and creating profiles. Modification of the wording should be considered with a view of ensuring that even if the data controller do not create profiles as such, the processing can be sometimes regarded as "the monitoring of the behaviour", if they lead to "decisions concerning a person or for analysing or predicting her or his personal preferences, behaviours and attitudes".

11. Definition of „data subject" in art. 4 par. 1

According to the definition "data subject" means "an identified natural person or a natural person who can be identified". A natural person can be considered as "identified" when, within a group of persons, he or she is "distinguished" from all other members of the group and consequently can be treated in the other way. It was defined in the adopted opinion of the Data Protection Working Party[1] (WP136). Therefore the recital 23 should be amended so as to explain that the traceability covers also distinction (identification).

12. Definition of biometric data in art. 4 par. 11

This definition is focused on the ensuring of the precise identification of the natural person. Biometric data are used not only for identification purposes, but also for authentication (to verify identity without real identification of a person). Definition should be amended to focus on these types of data that should be considered as biometric instead of to focus on what they enable. Consequently Poland proposes to modify wording of the expression in the article 4 paragraph 11 from "allow their unique identification" to "are iunique for each natural person"

1 http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_pl.pdf

13. Recital 18

The recital 18 of the proposal for a regulation allows the principle of public access to official documents to be taken into account when applying the provisions set out in this Regulation. Considering this rule has been for a long time an important and firm primary right / basic right with strong legal basis, it should be laid down not only in the recital but also in the article of the regulation.

14. Doubts regarding art. 6 par. 2

English version of the regulation lays down that: *Processing of personal data which is necessary for the purposes of historical, statistical or scientific research shall be lawful subject to the conditions and safeguards referred to in Article 83*. In the Polish version instead of "statistical (…) research" there is a "statistics" as a whole. Reference to the article 83 proves that Polish translator „introduced" in the article 6 par. 2 more coherent provisions (considering that article 83 regards „statistical purposes"). It's not clear why the terms „statistical research" and „statistical purposes" are applied alternately in the proposal.

It should be clarified whether there is applied one term covering all objectives and statistical methods. It seems that the referred provision does not concern only public statistics but mainly actions taken by the entities other than responsible for public statistics or preparing materials for purposes of public statistics.

15. Relation of article 6 paragraph 1(c) to article 6 paragraph 2

The first of referred provisions considers processing of personal data as lawful if "processing is necessary for compliance with a legal obligation to which the controller is subject". This is a situation of the national statistical authorities acting on the basis of separated national as well as EU regulations. The second referred provision concerns inter alia statistics, indicates that processing of personal data which is necessary for the purposes of statistical research shall be lawful subject to the conditions and safeguards referred to in Article 83, which are not known (it's foreseen to precisely define them through delegated acts). Confrontation of both provisions evokes a question on the position of the national statistical authorities.

16. Relations between a 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 (COM(2012)11) and Proposal for a Regulation of the European Parliament and of the Council on administrative cooperation through the Internal Market Information System (COM(2011)522)

The definition of "processing" included in the article 4 paragraph 3 of the Proposal for a General Data Protection Regulation (COM(2012)11) contains wide list of operations on personal data while the IMI regulation (COM(2011)522) refers to blocking. In fact the IMI regulation contains the definition but it seems valuable (practical) to include this definition also in the General Data Protection Regulation.

Moreover the Proposal for a General Data Protection Regulation the term "erasure" is applied while the IMI regulation contains the term "deletion". Current provisions do not explain whether "erasure" should be comprehended as "deletion". If the meanings of these terms are not identical then the catalogue of operations should be supplemented with the term "deletion". It seems that the legal terms should refer to these applied in the Directive 95/46/WE (considering their meanings were not modified).

ROMANIA

Article 2 - **Material scope** point 2(e): *"by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties"* **shall be reformulated as follows** *:"by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties and ensuring public order and security".*

Article 4 – **Definitions** shall be completed with the definition of the *"transfer to third countries or international organizations",* taking into account the content of chapter V - **Transfer of personal data to third countries or international organizations**, as follows:

"(20) 'transfer of personal data to third countries or international organizations' means a transmission of personal data, object of a processing or intended to be processed after the transfer, while the third country or international organization ensures an adequate level of protection which must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations."

Article 8 - **Processing of personal data of a child,** point 8(1), shall be reformulated as follows*:*
"(1) For the purposes of this Regulation, in relation to the offering of information society services directly to a child, the processing of personal data of a child below the age of 14 years shall only be lawful if and to the extent that consent is given or authorized by the child's parent or custodian. The controller shall make reasonable efforts to obtain verifiable consent, taking into consideration available technology."

Article 9 - **Processing of special categories of personal data,** point 9(1), shall be reformulated as follows:
"1. The processing of personal data, revealing race or ethnic origin, political opinions, religion or beliefs, trade-union membership, and the processing of genetic data, biometrical data or data concerning health or sex life or criminal convictions or related security measures shall be prohibited."

SLOVENIA

1. General systemic position

As is known, the Republic of Slovenia has significant, systemic scruples with respect to the Draft of the General Data Protection Regulation as of 27 January 2012. We are of the opinion that this draft legal act of the European Union should be drafted in the form of the directive and not in the form of the regulation. This is our known position from the viewpoints of constitutionalism, principles of subsidiarity and proportionality.

All our positions stated below are to be understood in the context of the aforementioned sytemic scruples.

Additonally, we understand this process of commenting on Chapters I and II of the Draft of the General Data Protection Regulation to be an additional process that does not replace the dialogue at the DAPIX meetings, but can be understood as a possible aid to the existing transparent and detailed dialogues at the DAPIX meetings.

2. Specific remarks on Chapters I and II of the Draft of the General Data Protection Regulation

In accordance with the request of the Danish Presidency of the Council of the European Union we do not repeat the same arguments that were already made at the DAPIX meetings. We do however open two additional pathways for discussion, by stating two additional systemic or constitutional arguments with respect to the Article 6, paragraph 3 of the Draft of the General Data Protection Regulation. The aforementioned provision states in the relevant part:

"The law of the Member State must meet an objective of public interest or must be necessary to protect the rights and freedoms of others, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued."

The two additional arguments:

I. Possible discrepancy with differently tailored provisions of the Charter of Fundamental Rights of the European Union

If Article 52, paragraph 1 of the Charter of Fundamental Rights of the European Union is to be deemed to be the basis for the provision of Article 6, paragraph 3 of the Draft of the General Data Protection Regulation, then it is clear that it goes above the provision of the Charter. The Charter provision explicitly uses the term "provided by law", does not use the term "public interest", but uses the term "general interest", and in essence provides for a legal basis for limitation of rights, and does not entail the basis for proscription of their further development by national law. Article 53 of the Charter maybe provides additional light to this issue, because of its general (systemic) interpretation power, namely it mentions that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, amongst others, also by the Member States' constitutions.

Also, additionally, with respect to Article 52, if the source of the provision from the Draft Regulation stems from that provision of the Charter, it is clear that the arrangements for the limitation of rights are connected with the regulated rights themselves (in this case the right to data privacy) and require in every specific case of regulation a human rights impact (limitation) assessment of draft provision(s). The aim of this provision is therefore not to limit the Member States` law making acitivity, and it is logical that Member States cannot be deemed as (re)presenting the limitation of rights, or in brief: Member States are not to be systematically suspected as being oriented to limitation of rights and this cannot be based on the Charter.

The conclusion that can be reached is this:
The Charter can not be deemed to be the basis (or a requirement) for this provision of the Draft Regulation, since the Draft Regulation changes and adds formulations from the Charter and can only be deemed to be ultra vires and constitutionally suspect.

II. Obvious potential conflict between provisions of the Draft Regulation and provisions of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981

Since it is clear that we have a competing set of provisions on general and specific data protection rules as envisaged in the Draft Regulation and in the existing Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981[1] and since this Convention is in the process of being amended at the moment by the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data it is logical, that provisions regulating similar issues might differ in substance, sometimes providing more rights, sometimes providing less rights for data subjects and similarily for data controllers. It is also not to be expected that the Conventions` provisions shall be aligned by provisions of the Draft Regulation. The result might be, irrespective if a certain Member State subscribes to the theory of monistic or dualistic approach to the international law, that this shall prove to be the seed of conflicts in interpretation and application. Either the Member State fully conforms to the Regulation and therefore violates some substantively different provisions of the Convention, or it tries to apply both the Regulation and the Convention at the same time and due to discrepancy in some ot their provisions acchieves a different (un-intended) or unclear result. There is no clear solution that would take into account the provisions of the Regulation and the Convention at the same time and for example, the idea that the Regulation shall be directly applied while at the same time the Convention should be transposed in national law via a separate general data protection law (Act) is simply innaplicable.

For example, taking into account also the proposals for the revision of the Convention, there are some partial differences concerning the Draft Regulation with respect to issues of:

- personal or household activity,
- duties of Member States - they should transpose the Convention into its domestic law,
- legal grounds for data processing (legitimacy of data processing) are termed a little bit differently,
- information to be provided to data subjects,
- rules processing for statistical purposes or for the purposes of scientific research are deemed to be more "free" in the Convention etc.

1 ETS No. 108.

If the right to protection of personal data (data privacy) is an individual human right *per se*, and it is primarily so, then this conflict should be resolved - resolved in such a manner that it clearly and guarantistically helps and protects rights of data subjects and also interests of data controllers.

The conclusion that can be reached is this:
The possible conflict between the Draft Regulation and the existing and/or amended Convention invites a significant amount of legal uncertainty and possibly also unintentional unlawfulness and conflicts of "jurisdiction" to occur and it should be totally clearly resolved in the current law drafting process. Additionally, there is no known precedent for resolving such a conflict, and such a burden should not be left to data subjects, data controllers and also not to the national data supervisory authorities and administrative bodies which may be bound in some Member States also to directly apply the existing or the future amended Convention.

3. General conclusion

Following these new additional systemic arguments we therefore propose that the text of subparagraph 2 of paragraph 3 of Article 6 of the Draft of the General Data Protection Regulation should be deleted, and the law drafting process should continue by taking into account this possible systemic decion, which might influence the draft legal act overall

SLOVAK REPUBLIC

Dear Colleagues,

first of all let us thank you for the opportunity to send in our, as well as other delegations' proposals for amendments or comments on Chapters I and II of the 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) (hereinafter "Proposal for a Regulation").

The Slovak republic is aware of the importance and meaning of new legal framework for the protection of personal data. The Slovak republic identifies with an effort and the intention to harmonize the legislation and welcomes the chosen form of an approach to define the general legal framework of the protection of personal data through the regulation, which is directly applicable in all Member States. Therefore it is necessary to notify, that the greater emphasis should be laid on accuracy, consistency and clarity of selected formulations of various provisions, in order to avoid different interpretation and application of articles in Member States.

The Proposal for a Regulation is able to be perceived as an ambitious material. Many of its parts require massive and broad discussion, not only from point of view of the public, but mostly from the previously acquired practical knowledge of experts in the field of protection of personal data for the purpose of enhancement and smooth implementation of the Proposal for a Regulation in practice.

In compliance with your request for sending the comments and suggestions to the I and II Chapter of the Proposal for a Regulation, the Slovak republic considers necessary to send in, except comments and suggestions that have been presented at the Dapix meetings, also the following comments and suggestions:

At the beginning, we consider necessary to give into your attention the fact that regulations of European Parliament and the Council are legal binding acts, which are directly applicable in all Member States. For this reason it is necessary, in the interest of legal certainty in the application of each regulation in practice and also in preparing of this Proposal for a Regulation, to state its wording clearly and expressly explain various articles as well as define or specify many used terms in the text of the Proposal for a Regulation (e.g. *"legitimate interests"* related to the data subject or controller, *"reasonable period"*, *"commercial interest"*, *"appropriate safeguards"* etc.). Without executing of these changes, the Proposal for a Regulation will not provide legal certainty to anybody and will not be exercisable in practice to ensure a sufficient level of protection to the data subjects. In respect of the focus of the Proposal for a Regulation – the fundamental rights and freedoms – this requirement is reasonable.

Chapter I, General provisions

Article 1

Formulations of the Article 1, Paragraph 2 and 3 of the Proposal for a Regulation collide. The formulation in Paragraph 3 "*The free movement of personal data within the Union shall neither be restricted nor prohibited",* significantly reduces the space for application of right of natural persons to the protection of personal data regulated in Paragraph 2. Therefore, the proposed wording is needful to be redrafted so that it would also remove the doubts about the allowance of processing of personal data from one Member State in another Member State, also in case, if such processing in another Member State is not necessary or reasonable.

Other comments and suggestions to this article that were raised by the delegations at the Dapix meetings, we insist on.

Article 2

- In the Article 2 Paragraph 2 letter a) of the Proposal for a Regulation we consider necessary to explain the term *"national security"* and its relationship to the term *"public security"* mentioned in Article 21 Paragraph 1 letter a) of the Proposal for a Regulation. These terms are in EU terminology considered as equivalent, although they are not used in the same extent. In case that there is not an expository and applicative difference between these two terms for the purpose of this Proposal for a Regulation, it is necessary to provide the harmonization of mentioned articles. The content of these provisions is necessary to put more exactly, eventually explain this intent.

- In the Article 2 Paragraph 2 letter d) of the Proposal for a Regulation financial motivation should be the basic criteria for processing of personal data. Personal data obtained e.g. from social networks can be processed without the repayment activities. Personal data can be systematically processed also within of personal or private activity. Activity of such elaborator will not be regulated, but only criminal law sanction can be imposed on the legal ground of EU (or Member States) legislation (as it is now). In the Article 2 Paragraph 2 of the Proposal for a Regulation it is necessary to redraft the letter d), in order to definitely express that the Proposal for a Regulation does not include the processing of personal data:
    - processed by the natural person for his own needs only within explicitly own (personal) or domestic activities, such as e.g. keeping personal address book or correspondence, and
    - obtained randomly without previous determination of the purpose of processing, with no intention of next processing as a controller or processor in an organized system according to specific criteria and are not further processed systematically.

Other comments and suggestions to this article that were raised by the delegations at the Dapix meetings, we insist on.

Article 3

The content of the Article 3 Paragraph 2 of the Proposal for a Regulation we consider, in state as it is drafted, to be problematical and difficult to implement in practice (from the point of view of control and supervisory powers). In particular, the letter b) is apparently concerning the situations, when controller monitors the behaviour through the use of internet, resulting in behavioural advertising tailored to the results of the analysis, offering certain products and services. The mentioned letter b) in such way may also include situations, where controller collects and processes personal data of natural persons from various Member States on the territory, where he is established (outside the EU), e.g. through a video recording in a shopping centre. Natural person in such case is not legitimized and controller normally does not know that the person is from the EU.

Proposed paragraph should reflect, except upper mentioned, also purposes of processing of the personal data and no just description of activity, which is drafted in very wide and general way. The proposed wording of this provision needs to be clearly defined, so that it can be applicable in practice.

Other comments and suggestions to this article that were raised by the delegations at the Dapix meetings, we insist on.

Article 4

– The most important term in the Proposal for a Regulation, same as in the Directive 95/46/EC, is without any reasonable doubts the term *"personal data"*. Unclear formulation of this term would cause problems in applying the whole regulation in practice. Proposal for a Regulation in legal definition of the term personal data in the Article 4 Paragraph 2 constitutes the correlation of terms *"personal data"* and *"information"*. In addition, the Proposal for a Regulation is often using also the term *"data"*, similarly as in the Directive 95/46/EC. But the Proposal for a Regulation does not specifically define the term *"data"* and does not determine its correlation to the terms *"personal data"* and *"information"*. In the proposed text of this regulation, this term occurs in two meanings:

- *"data"* in the meaning of *"information relating to the data subject"* (see e.g. definitions in Article 4 Paragraph 10 and 12), whereby it can be subsumed under definition in Article 4 Paragraph 2,
- *"data"* in the meaning of *"data that do not allow the controller to identify the natural person"* (see e.g. Article 10).

Such an approach can cause considerable problems in practice. In the Proposal for a Regulation is therefore necessary to define the term *"data"* and determine its relationship to the terms *"personal data"* and *"information"*, or distinguish between the terms *"information"* and *"data"* for each individual case.

– Article 4 Paragraph 1 and 2 of the Proposal for a Regulation provides a new definition of a term *"personal data"* and *"data subject"*. Just these two terms can be considered as crucial in whole area of personal data protection, and therefore it is necessary to dedicate them advanced attention. Unlike the current valid definition stated in the Directive 95/46/EC, the Proposal for a Regulation is missing an explicit wording, under which *"personal data are data relating to an identified or identifiable natural person*". This "*identifiable"* natural person results from the proposed definition only indirectly. The wording of this term therefore evokes e.g. a question whether a natural person recorded by the security camera system will be considered as a data subject. On the base of the recorded data, the data subject is not generally identified and in a given moment it cannot be identified either (controller located outside the EU or in other Member State has not too many options how to identify recorded natural person). Recorded person thus is not identified and it cannot be even identified, therefore a question arises, whether the recorded person can be described as the data subject at all. In such situation, under the upper mentioned articles the following conclusion can be drawn: if the natural person on the record does not have a status of data subject, the record does not contain personal data (Article 4 Paragraph 2). The problem can occur if the controller will state that the Proposal for a Regulation does not apply to his camera system or does not mean any risks (e.g., Article 33 and 34), forasmuch he does not collect any personal data of data subjects.

  We are of that opinion that the new definition may in practice (and in this particular case) cause the indicated as well as other problems. Therefore, we consider necessary to redraft the proposed wording and complete it explicitly by the so-called "*identifiable"* natural person as well as it is in the Directive 95/46/EC.

– In Article 4 Paragraph 3 of the Proposal for a Regulation, despite the demonstrative enumeration of processing operations, we are of that opinion that in mentioned enumeration it is necessary to state explicitly also *"making personal data public"* and *"copying"* of personal data. This requirement results from the cases that The Slovak DPA frequently deals with. Mentioned terms are relatively sensitive processing operations, performing of which one can easily breach the rights of data subjects for protection of their privacy and personal data.

  In this context it is also needful to consider and propose specific legislation concerning copying the official documents and conditions of making personal data public for purpose of increasing the protection of privacy of individuals.

– Article 4 Paragraph 4 of the Proposal for a Regulation we propose to redraft. The wording can bring significant problems to practice in an interpretation and application of this term. The primary need in case of defining this term is to provide an interpretation (including differences) and determine which term, whether *"filing system"* or *"information system"* is broader and which one is necessary to apply in the area of data protection. This requirement also arises from the question regarding the following correct translation and practical application. We are of that opinion that in defining this term it is necessary also to consider e.g. Opinion no. 4/2007 of working group set up under Article 29 of the Directive 95/46/EC, example number 16.

– Article 4 Paragraph 9 of the Proposal for a Regulation defines the term *"personal data breach"*. This term, however, should have apply and mean not only the breach of security, but also a breach of other obligations under this Proposal for a Regulation, refering to the wording of Articles 78 a 79, under which sanctions may be imposed not only in cases of breach of security, but also according to other provisions of the Proposal for a Regulation. Imprecise definition of the term *"personal data breach"* may cause problems in practice, because competence to impose sanctions evokes violation of obligation, but not only security obligation how it is stated in the Article 4. Proposed wording of Paragraph 9 *"personal data breach means a breach of security..."* we consider necessary to redraft in the following way *"personal data breach means breach of obligations..."*

– In Article 4 Paragraph 13 of the Proposal for a Regulation we suggest the term *"main establishment"* to redraft appropriately, in order to clearly define objective criteria for its determination. Point 27 of Preamble also deals with this our suggestion.

– Article 4 Paragraph 14 of the Proposal for a Regulation defines the term *"representative"*. From the wording of this term is not clear, whether the representative according this Paragraph means representative stated in Article 25 in conjunction with Article 3 Paragraph 2, i.e. representative of controller established outside the EU, or representative in general, referring to the territory of EU Member States. Proposed wording we propose to define clearly in the context of mentioned articles.

– Within the Article 4 of the Proposal for a Regulation we require to discuss and consider the distinction between legal institutions *"provision of personal data"* and *"making personal data available"* and solve the issue of the following handling and disposing of provided or made available personal data. Under current law No. 428/2002 Coll. on protection of personal data as amended, which is valid and binding in the Slovak republic:
    - *provision of personal data* shall mean submitting of personal data for their processing to another controller or to the controller's representative or his processor,
    - *making personal data available* shall mean disclosing of personal data or making them available to another legal or natural person, except for the data subject or the entitled person, who will not process them as a controller, controller's representative or processor.

  Upper mentioned legal institutes do not have only different meaning from linguistically point of view, but also from side of processing operations that should have been reflected, defined and distinguished also within processing the personal data under Proposal for a Regulation, including the possibility of following handling and disposing of personal data after their provision or making available to another person.

– Into the Article 4 of the Proposal for a Regulation we consider necessary to include also a new term *"entitled person",* i.e. define a natural person who disposes of personal data within of his/her employment relationship, civil service employment relationship, civil service relationship, membership, based on authorization, election or appointment or within the framework of performance of a public office, who may process personal data only upon instruction of the controller, controller's representative or processor. This requirement is necessary to be considered, because it is a needful legal institute in the field of personal data protection and it would significantly influence also other articles of Proposal for a Regulation (for instance Articles 22 and 35 to 37); e.g. relating to obligations of controller and processor or determining obligations to have designation of the data protection officer. Creation of this term and obligation to advice these entitled persons about their rights and obligations and liability for their breach concerning the handling and dealing with personal data and arrangements of related articles of the Proposal for a Regulation would be helpful for supervisory authorities in investigation of particular cases. This change would be useful also for controllers and processors, who in case of breach of the obligations according to this Proposal for a Regulation would be able to apply a labour-law responsibility against particular employees, who committed e.g. making personal data available to unauthorized persons.

– And into the Article 4 of the Proposal for a Regulation we consider necessary to include and define the terms *"to make anonymous"* and *"pseudonymization"*, which absent in the Proposal for a Regulation. The experience from practice shows that these two terms are often used incorrectly or they are replacing each other. In addition, it is not quite clear, to which category the so-called masking of personal data belongs, as in the case of transfers PNR to USA.

Other comments and suggestions to this article that were raised by the delegations at the Dapix meetings, we insist on.

Chapter II, Principles

Article 5

- Proposal for a Regulation also works only with general term *"processing of personal data.* If the controller uses as the legal base the consent of data subject, he determines by himself, what operations in processing he will realize, including sensitive operations, e.g. making personal data public. In this context Linqvist case C-101/01 should be mentioned, where the following problem, if the publication of personal data on website may be considered also as transfer to whole third countries, where exist needful technical equipment for access to internet, was being solved for the first time. In this case stricter regime of protection for each publication of personal data would by applicable, which could significantly restrict the freedom of spreading of the information on the internet. Realizing the negative impact, the Court issued a decision, where it stated that the uploading of personal data on the website stored at a hosting provider established in the same or in another Member State, and their following making them available for all who have access on the internet is not *"transfer to the third country"* (Lindgvist point 71). Thus uploading of personal data on the internet is not subject to the specific regulation. Under Article 5 therefore we suggest in general to constitute: *"Personal data shall be processed only in way, which is reasonable and necessary for achieving the purpose of the processing.", or "Through processing of personal data can be used only such operations with personal data, which are reasonable and necessary for achieving the purpose of processing."*

- We propose redraft the Article 5 letter d) of the Proposal for a Regulation, in order to reflect the fact that personal data must be *"complete",* not just accurate. At the same time we propose in relation to this letter a reconsideration of the possibility of inserting and keeping marked non actual personal data, when it is necessary and reasonable.

– Article 5 of the Proposal for a Regulation is almost whole taken from the Directive 95/46/EC. However, it is in the interest of achieving the legal certainty in application of Proposal for a Regulation in practice that the Article 5 would regulate the principles relating to personal data processing in more clearly and extensively way. Regarding the form of this preparing legal act, it is impossible that regulation, which is directly applicable, almost at all copied the articles of Directive 95/46/EC, which the individual Member States implemented and specified in national law orders in their own way.

Other comments and suggestions to this article that were raised by the delegations at the Dapix meetings, we insist on.

Article 6

– First sentence of the Article 6 Paragraph 1 of theProposal for a Regulation in the way it is drafted allows concurrence of legal bases referred in letters a) to f). Acceptance of this formulation would mean providing the possibility of uncontrolled processing without proper usefulness. Without clearly defined rules, although it would not be legitimate and reasonable, it may involve the use of multiple legal bases. Example of such concurrence is processing of personal data on the base of law and fulfilment of lawful obligations of controller, who in the case of absence of legal regulation would for the performance of certain processing operation, upon his own consideration, obtain consents of data subjects and process their personal data in concurrence of these two legal bases. From this reason we propose the wording of this paragraph to redraft in a way that a new paragraph 1 would enumerate capable legal bases for lawful processing of personal data and new paragraph 2 would regulate the permitted exceptions of the concurrence of the legal bases. Each letter of this Paragraph is also necessary to specify accurately for purpose of correct application of mentioned article in practice.

– Proposal for a Regulation in proposed articles does not pay attention to camera systems and video monitoring the premises accessible to the public, conditions of operating and processing thus obtained records. The video and audio records without reasonable doubts have impact on area of protection of personal data and it is necessary to dedicate to it proper legislation. In this regard, we note that this requirement is legitimate because such monitoring also means the processing of special categories of personal data in accordance with Article 9 of the Proposal for a Regulation.

– Article 6 Paragraph 1 letter a) of the Proposal for a Regulation concerning the consent of data subject is drafted precisely *"...for a specific purpose or purposes",* where on the other hand, the Article 9 Paragraph 2 letter a), which also relates to the consent of data subjects, does not contain mentioned formulation. In regard to this, in both cases there is processing of personal data on base of consent of data subject. It is necessary to harmonize these provisions.

Other comments and suggestions to this article that were raised by the delegations at the Dapix meetings, we insist on.

Article 7

– Processing of personal data upon consent of the data subject is one of the most important legal institutes in the area of the personal data protection. We are of that opinion that except comments and suggestions raised from all the delegations in the previous Dapix meetings, it is necessary to consistently deal with the following issues related to the consent of data subject:
  a) can the consent as a legal base for processing of personal data exists in concurrence with other legal bases stated in the Article 6 letter b) to f),
  b) is the time of validity of the consent limited, or is given for an unlimited time,
  c) is the consent given for the whole process of processing of personal data or just for particular operations (the formulation "extent consent is given" appears only in the Point 32 of Preamble).

The answer that the European Commission provided at the Dapix meeting, that when discussing the processing of personal data upon consent, the emphasis would be laid on the purpose of their processing, is not sufficient. In this context we consider necessary to put these questions into your attention again and stress on the need to deal with them carefully, as with the issue of time limits as well as with the extent of granted consent. Time of validity of the consent should have been limited and reasonable to the purpose of processing. In the present, the limitation of the processing of personal data upon consent of the data subject is already known as well as used in many Member States, not just in the Slovak republic. The controller should consider and estimate the circumstances and character of processing of personal data and set the length (and need) of real processing of personal data (i.e. the time period during which the controller will need the personal data). If it would be possible to process personal data upon consent of the data subject with no time limitation, then also a long deceased data subject would be contacted e.g. by company offering services or goods, because this company would not have any knowledge about fact, that the person is not alive anymore. If the controller has an interest to further processing of personal data, he is obliged to ask this data subject before the expiration of time of granted consent for a new consent. If the data subject gives to the controller new consent, he can continue in processing of personal data, and if no (e.g. from reason that data subject is not alive), the controller is obliged to exercise such measures that will lead to the destruction of personal data, or to the beginning of time limit for their storage before their destruction in compliance with national legislation of each Member State.

Article regulating processing of personal data upon consent should also take into consideration the issue, whether this consent is granted for the whole process of processing of personal data or only for single operations. This fact, which is also not resolved, results also from the wording of the Point 32 of Preamble, under which if the processing is based upon consent of data subject the controller is obliged to prove, that the data subject expressed consent with processing operations. The data subject must be advised of the extent, i.e. for which particular processing operations the consent is granted.
Consent should also contain certain essentials that would be defined by the Proposal for a Regulation. Under the previous experiences from practice, it should include mainly information about who gave consent, to whom it was given, for what purpose, list or extent of personal data, time of validity of consent and conditions of its cancellation.

From the corresponding articles of the Proposal for a Regulation it should be also clear, that expression of consent of the data subject is on the base of voluntariness and controller cannot enforce nor make it conditional with a threat of rejecting the contractual relation, service, goods or duty of the controller or processor laid down by law. In case, that the data subject decides not give a consent for particular processing of personal data, the controller must such free decision accept without no reservations.

Other comments and suggestions to this article that were raised by the delegations at the Dapix meetings, we insist on.

Article 8

The most important comments and suggestions to this article that were already raised by the delegations at the Dapix meetings, we insist on.

Article 9

- The Proposal for a Regulation in the Article 4 defines the term *"biometric data",* but this is no longer included in the following legislation. Based on this definition it is evident that we are dealing with sensitive personal data, according to which the subject data is clearly and unequivocally identifiable. Therefore the necessity of its specific regulation is highly desirable. These data can be defined as biological characteristic, physiological characteristic, features or repeatable actions, which are specific for particular natural person. They are also able to be technically measured, although methods applied in practice for its technical measuring involve certain degree of probability. Like other personal data included in enumeration of Article 9 Paragraph 1, also biometric data have certain specialty (namely that these data can be considered as a content of information about particular individual). The biometric data on the base of upper mentioned should have been contained in the enumeration of personal data, which are classified as the special category of personal data.

It is also necessary to deal with the issue of processing biometric data for purposes of registration and identification in entering the premises, afterwards also distinguish the areas, where this need is reasonable and in compliance with the purpose of processing (e.g. processing biometric data of employees working in a retirement home cannot be considered as necessary for achieving the purpose of the processing – this is the particular example the Slovak DPA dealt with in practice). Therefore we propose to include the words *"biometric data"* into the wording of the Article 9 Paragraph 1 in compliance with Article 4 Paragraph 11 and also draft the legislation that would concern the processing of biometric data, especially in relation to processing for purposes of registration and identification in entering the premises, as well. At the same time we are of that opinion that the upper mentioned word *"unequivocally"* should have been added in definition of the term biometric data.

– In the Article 9 Paragraph 1 letter e) of the Proposal for a Regulation we require an explanation, how you would deal with the situation when personal data would be made public by other person than the data subject, and these personal data would be afterwards made public by another people (e.g. internet), who do not have the knowledge that personal data were not made public by the data subject. Would the prohibition of processing personal data also apply in this case?

– In the Article 9 of the Proposal for a Regulation we propose to integrate an identifier of general application (the birth number or other personal identification number of the data subject). In this relation it is necessary to mention the fact that in the Slovak republic personal identification number (so-called birth number) is a permanent identification personal data of natural person, which guarantees his/her definiteness in filing systems. Personal identification number is being assigned to every natural person in occasion of his/her birth in the territory of the Slovak republic. This personal identification number includes the date of birth as well as the determination of gender and the ending, which means differentia for persons who were born during the same day. In the Slovak republic the personal identification number as an identifier of general application falls under a higher level of protection and this personal data can be processed only if its use is necessary for achieving the purpose of the processing and its releasing (publication) is absolutely prohibited.

Taking into consideration that every natural person in each Member State has certain personal identification number, it is necessary to integrate into the Proposal of Regulation also the specific legislation of these data, namely in relation to those Member States, which already provide specific protection to mentioned data.

Other comments and suggestions to this article that were raised by the delegations at the Dapix meetings, we insist on.

Article 10

Article 10 of the Proposal for a Regulation concerning the processing without possibility of identification is necessary to draft more precisely. Neither from this article, nor from the corresponding part of the Preamble is clear, what is its purpose and what meaning it should have in practice.

SWEDEN

Introduction

The Presidency has invited delegations to send in proposals for amendments or comments regarding chapters I and II of the draft General Data Protection Regulation. Sweden welcomes the Presidency's initiative and presents in this paper some short comments and proposals for amendments, in addition to those already put forward at the meetings of the working party. Since the negotiations are still in an early stage and as we are still analysing the proposed Regulation, the comments and proposals in this paper should be considered as preliminary. After some general comments, relevant parts of the draft Regulation is reproduced with our proposed amendments and comments inserted in red letters/italics.

General comments

Sweden welcomes the reform of directive 95/46/EC. We firmly believe that there is a need to modernise the current legislation. At the same time, we are convinced that there is a need to leave a certain margin of manoeuvre for the Member States. This is especially important in the public sector, where different constitutional traditions and administrative structures must be taken into account. In view of the need for national legislation we believe that the reform of the general data protection rules should be pursued within the framework of a reinforced directive and not through a regulation. It is also of great importance that the reform does not affect Member State legislation on the right of access to official documents. Further, Sweden is not convinced that the Commission should be empowered to adopt delegated acts in the extent proposed in the first two chapters of the draft Regulation. It is questionable if there is a need for delegated acts to this extent and it could even be argued that the delegated powers are not restricted to non-essential elements in accordance with Article 290 of the TFEU.

CHAPTER I
GENERAL PROVISIONS

Article 2
Material scope

2. This Regulation does not apply to the processing of personal data:

(a) in the course of an activity which falls outside the scope of Union law, in particular concerning national security;

Comment: There is some uncertainty as to what "outside the scope of union law' means. Shall tax authorities be subject to the regulation as regards VAT but not income tax? This question may arise also in the application of the current Directive, but is in practice seldom a problem since the Directive has been implemented in a general way, thus covering also areas outside the scope of union law. Since a regulation may not be implemented the question arises whether to adopt national data protection rules to areas not covered by the Regulation. This underlines the importance of making it clear what margin of manoeuvre the Regulation leaves to the Member States to adopt national data protection legislation. This is especially important in the public sector, where different constitutional traditions and administrative structures must be taken into account. It can also be of great importance in some private sectors, especially where functions of general public interest have been entrusted to private actors. We believe that it should be clarified in the text of the Regulation that there is room for national rules on the processing of personal data, as long as such rules are in compliance with the Regulation.

(d) by a natural person without any gainful interest in the course of its own exclusively personal or household activity;

Comment: As a consequence of the rapid technological development, the use of ICTs for processing sound and image data and continuous text has become widespread. Processing of large amounts of personal data by automatic means has thus become a natural part of everyday life for almost everyone. The provisions of the draft Regulation on the actual processing of personal data appear too comprehensive and complicated for such ordinary processing that is in most cases completely harmless. Sweden believes that if the Regulation is to gain public acceptance and have a real effect in practical application, necessary exemptions and adaptations should be introduced for ordinary processing such as the use of e-mail programs and individuals' use of social media. The aim should be to concentrate the rules governing everyday processing on the essentials, namely, protection against harmful misuse. An important part of everyday processing is carried out by natural persons. The above-mentioned problems could therefore be partially resolved by amending the so-called household exemption in such a way that the Regulation would not be applicable to everyday processing carried out by natural persons. Sweden looks forward to a constructive dialogue regarding this issue.

(e) by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.

Article 4
Definitions

For the purposes of this Regulation:

(1) 'data subject' means an identified natural person or a natural person who can be identified, directly or indirectly, by means reasonably likely to be used by the controller or by any other natural or legal person, in particular by reference to *a~~n~~ name*, 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;

Comment: It should be explicitly expressed, either in this article or in a recital, that the definition of 'data subject' does not cover deceased persons. It also seems reasonable to include 'name' in the list of examples.

(2) 'personal data' means any information relating to a data subject;

(8) 'the data subject's consent' means any freely given specific, informed and explicit indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action, signifies agreement to personal data relating to them being processed;

Comment: Sweden is at this stage not convinced that the definition of consent should be changed to include 'explicit'. It has to be closely examined what consequences this would have.

(10) 'genetic data' means all data, of whatever type, concerning the characteristics of an individual which are inherited or acquired during early prenatal development;

Comment: The proposed definition of genetic data covers a wide range of data, including many categories of data which does not seem particularly sensitive. For instance, the definition could well include easily observable information about gender, hair colour etc. Sweden questions whether it is reasonable that all processing of genetic data covered by this definition is also covered by the prohibition in Article 9. One might therefore consider adding the qualification that the data in question should be a result of a genetic investigation, either here in the definition or in Article 9.

CHAPTER II
PRINCIPLES

Article 5
Principles relating to personal data processing

Personal data must be:

(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; personal data may be stored for longer periods insofar as the data will be processed solely for historical, statistical or scientific research purposes in accordance with the rules and conditions of Article 83 and if a periodic review is carried out to assess the necessity to continue the storage;

Comment: Processing for historical, statistical or scientific purposes that does not qualify as research per se is not covered by this article. As we understand the explanations given by the Commission this however is not meant to impose any restrictions on such processing in comparison to the provisions of the current Directive. This needs to be made clear either in an article or in a recital.

(f) processed under the responsibility and liability of the controller, who shall ensure and *shall be able to* demonstrate ~~*for each processing operation*~~ the compliance with the provisions of this Regulation.

Comment: The obligation introduced in this provision to 'demonstrate' compliance needs to be clarified as to what is actually required. We would suggest that it is reasonable to insert 'shall be able to' before the word 'demonstrate' and to delete 'for each processing operation'. This would both clarify and balance the obligation imposed on the controller.

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:

   (f) processing is necessary for the purposes of the legitimate interests pursued by ~~*a controller*~~ *the controller or by the third party or parties to whom 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. This shall not apply to processing carried out by public authorities in the performance of their tasks.

   Comment: In the current Directive the wording of the corresponding article is '[…] interests pursued by the controller or by the third party or parties to whom the data are disclosed[…]'. As we understand the explanations given by the Commission 'a controller' is supposed to include both the controller and the third party, given that the third party is also a controller. However, if no actual change is intended, Sweden would prefer preserving the wording of the Directive to avoid uncertainty on this issue. An alternative could be to clarify in a recital that no actual change is intended by the new wording. Further, Sweden is not convinced that the legal bases in (a)-(e) are sufficient to cover the processing carried out by authorities. It appears, for example, not certain whether these provisions cover the processing of personal data (e.g. employee data) for the internal administration of an authority.

2. Processing of personal data which is necessary for the purposes of historical, statistical or scientific research shall be lawful subject to the conditions and safeguards referred to in Article 83.

   Comment: See commentary on Article 5 (e).

3. The basis of the processing referred to in points (c) and (e) of paragraph 1 must be provided for in:

   (a) Union law, or

   (b)the law of the Member State to which the controller is subject.

   The law of the Member State must meet an objective of public interest or must be necessary to protect the rights and freedoms of others, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued.

Comment: Sweden would like to underline the importance of clarifying the margin of manoeuvre for Member States. Failing this the Regulation might in fact lead to an unintended decrease in the level of protection for personal data. It should, inter alia, be clarified whether Member States legislation according to Article 6.3 (b) may contain specifications of other provisions of the Regulation such as Article 5.

4. Where the purpose of further processing is ~~*not compatible*~~ *incompatible* with the one for which the personal data have been collected, the processing must have a legal basis at least in one of the grounds referred to in points (a) to (e) of paragraph 1. This shall in particular apply to any change of terms and general conditions of a contract.

Comment: Sweden is at this stage not convinced that point (f) of paragraph 1 should be excluded from the scope of this provision. It is also unclear what is intended with the last sentence of the provision. Further, 'not compatible' should be changed to 'incompatible' in order bring the wording in line with Article 5 (b).

~~*5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the conditions referred to in point (f) of paragraph 1 for various sectors and data processing situations, including as regards the processing of personal data related to a child.*~~

Comment: See general comments.

Article 7
Conditions for consent

1. The controller shall bear the burden of proof for the data subject's consent to the processing of their personal data for specified purposes.

Comment: It should be clarified, either in this article or in a recital, that this provision does not apply in criminal proceedings according to Article 78, due to the presumption of innocence in Article 6 of the European Convention on Human Rights.

2. If the data subject's consent is to be given in the context of a written declaration which also concerns another matter, the requirement to give consent must be presented distinguishable in its appearance from this other matter.

3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal.

Comment: It should be clarified, either in this article or in a recital, what effect a withdrawal of consent will have on such personal data that is already being processed by the controller. In this respect, Article 17.1 (b) must also be taken into account.

4. Consent shall not provide a legal basis for the processing, where there is a significant imbalance between the position of the data subject and the controller.

Comment: There is a need to further clarify the scope of this provision. The current wording is too wide-reaching and vague and could prove problematic in practice. For instance, it could be questioned whether an employer should be prohibited, with no exemptions, from processing personal data regarding employees. It could also be argued that there is a significant imbalance between the data subject and the controller in most commercial situations. Further, Sweden questions if there is a need for this provision or if a similar result could be achieved by clarifying the meaning of a 'freely given' consent in a recital.

Article 8
Processing of personal data of a child

1. For the purposes of this Regulation, in relation to the offering of information society services directly to a child, the processing of personal data of a child below the age of 13 years shall only be lawful if and to the extent that consent is given or authorised by the child's parent or custodian. The controller shall make reasonable efforts to obtain verifiable consent, taking into consideration available technology.

Comments: As we understand the explanations given by the Commission this article is only supposed to apply when the legal basis of processing is consent. This should be clarified either in the article or in a recital. The draft Regulation is also missing a definition of the term 'information society services'. Further, is is unclear what the consequences would be if the controller does not make reasonable efforts to obtain verifiable consent according to the last sentence.

2. Paragraph 1 shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child.

3. ~~*The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the methods to obtain verifiable consent referred to in paragraph 1. In doing so, the Commission shall consider specific measures for micro, small and medium-sized enterprises.*~~

Comment: See general comments.

4. The Commission may lay down standard forms for specific methods to obtain verifiable consent referred to in paragraph 1. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).

Article 9
Processing of special categories of personal data

1. The processing of personal data, revealing race or ethnic origin, political opinions, religion or beliefs, trade-union membership, and the processing of genetic data *which is the result of a genetic investigation* or data concerning health or sex life or criminal convictions or related security measures shall be prohibited.

Comment: See commentary on Article 4 (10).

~~*3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria, conditions and appropriate safeguards for the processing of the special categories of personal data referred to in paragraph 1 and the exemptions laid down in paragraph 2.*~~

Comment: See general comments.

UNITED KINGDOM

General Comments:

We welcome the opportunity, provided by the Presidency of the Council, to make general comments and suggested textual amendments on Chapters I & II of the Regulation. At this stage, we would want to place a general scrutiny reserve on these chapters as there are a number of cross-cutting provisions that interact with later Articles and we would want to consider the package as a whole before reaching a definitive view on all the issues contained within the first two chapters.

We are of the view that the proposed general Regulation should be a Directive in order to provide greater member state flexibility to implement the measures – a Regulation would allow the EU to prescribe rules without necessarily giving due regard to national tradition and practice

There is an excessive number of delegated and implementing acts, which often does not constitute a correct exercise of the power conferred in the parent legislation - for example there are many instances in the instruments where the Commission has powers to impose further criteria or requirements which cut across essential aspects, such as pursuant to Article 6(1)(f) of the proposed Regulation in determining whether personal data may be processed on the basis of legitimate interests in various situations

The Regulation contains many prescriptive requirements in the main body of the instrument which places unrealistic obligations on data controllers, particularly on Small and Medium Size Enterprises and not-for-profit organisations. We welcome exceptions for SMEs and, further, propose that assessments on SME carve-outs should be considered on the basis of risk of processing to data subject. – Other prescriptive requirements includes requirements to notify a data breach within 24 hours, to maintain documentation of all data processing operations and mandatory data protection officers which could be costly and impractical for many business and organisations;

Effect of Schengen recitals on the application of the Regulation to the UK

The Regulation is classified as Schengen building. The UK considers that this classification is incorrect. The effect of this classification is to exclude the UK from the Regulation. The UK believes that the Schengen recitals should be removed and that the measure should not be classified as Schengen building. The UK is prepared to work with the Presidency to find a solution for the

participation of the associated states. Please see the attached annex A where this issue is set out in more detail.

The Impact Assessment and executive summary published by the Commission alongside the proposals make much of the possible savings to be made by minimising legal complexity and delivering administrative savings. However, our initial assessment suggests that the Impact Assessment does not provide a credible foundation to underpin the proposals. We have noted three issues in particular.

- the quantified impacts have not been thoroughly investigated. In particular, there are significant weaknesses with the widely publicised €3bn benefit from reducing "legal complexity".
- the Impact Assessment has focused on quantifying benefits without corresponding assessment of costs.
- the Impact Assessment exhibits many issues in relation to the method used to compile the analysis, for example: lack of a clear baseline; failure to consider impacts over time; absence of sensitivity testing to account for uncertainty; lack of Member State level analysis; multiple statistical errors; and no explicit consideration of winners and losers.

Article	Relevant Recitals	Issue/Concern	Proposed Text/Suggested Amendments
		Chapter I – General Provisions	
1 – Subject matter and objectives			
1 (2)	139		
1 (3)			
2 – Material Scope			
2(2)	14, 15, 16	• Paragraph 2 - the policy intention is apparently for the Regulation not to capture hybrid activities where the dominant purpose is within scope of **"personal or household activity" –** however some examples would seem to fall within scope of the Regulation – for	• 2(2)(d) - Recommend <u>removal</u> of "without any **gainful interest**" and put in additional text in the recitals which clarifies that processing can be for **" personal or household activity"** even where there are an **unlimited number of recipients** • 2(2)(d) Suggest <u>delete</u> **"its own"** and <u>change to</u> **"an"** – "its own" to improve drafting (i.e. "its" cannot be used in relation to a natural person"). • 2(2)(d) – suggest remove "exclusively" (also in

		example individuals trading on E-Bay or **users** of social networking sites promoting small profit making ventures to a small number of friends**.** **,** • It would be helpful to clarify that personal, commercial activity, such as selling ones' personal possessions on an auction site can also fall within the exemption.	recital 15). • Suggest adding (in recital 15) **"The number of individuals to whom the data are disclosed shall not of itself determine whether the processing of personal data is conducted by a natural person in the course of an personal or household activity."**
2(3)			
3 – Territorial Scope			
3(2)	21, 22	• Concerns over how 3(2) would work, where data controllers are not established in the EU and fail to appoint a representative. There is a real question as to whether this is enforceable and what steps Member States are expected to take in order to enforce where there is no existing mechanism.	• Recommend removal of Article 3(2) and removal recitals 21

		• This provision could lead to EU citizens to believe their data is afforded the same protection outside the EU as within it. If this is not the case then this will be misleading and confusing for data subjects.	
3(3)	22		• The reference in recital 22 to ".the Regulation should apply to a controller not established in the Union, such as in a Member State's diplomatic mission or consular post". The words "such as" suggest there are other examples other than Member State's diplomatic missions or consular posts – it would be useful if this was clarified as to what this could include.
4 – Definitions		.	• Request a scrutiny reserve for Articles 4(1), 4(2) as it is imperative that the definition is as clear as possible.
4(1)	23, 24	• We understand the policy intent is not to create a new definition of what can constitute "personal data", but to clarify what can constitute an identifier e.g. "online identifier". • The inclusion of the examples of identifiers has given the	• Suggest deleting at 4(1) and 4(2) and replacing with a single definition as in the 1995 Directive • Suggest **recital 23** is amended to make clear that the principles of data protection apply where a person can be easily identified. They do not cover identification of persons by means of very sophisticated methods where there is only a remote chance of identification.

		impression to stakeholders that there is a new and broader definition of what can constitute "personal data". It would create greater certainty to move the identifier examples from Article 4(1) to recital 23. • The definition of "personal data" should be free-standing – not embedded within "data subject". The approach used will be very confusing for users of the Regulation – controllers, processors and data subjects will want to know as a first step whether what they are dealing with is "personal data" . The definition of "data subject" then flows from that primary concept, not vice versa. • The scope of what could constitute "personal data" is unjustifiably broadened to include "any information	• Suggest <u>correction</u> at recital 23 to read **"reasonably likely to be used**" instead of **"means likely reasonably to be used"** • Suggest adding an <u>additional recital</u> to list how an individual may be identifiable (rather than list in Article 4(1)) Suggested text for recital: **An individual may be identifiable, for example, by reference to any one or more of the following 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.** • Suggest the <u>following changes</u> to **recital 24**: When using online services, individuals may be associated with online identifiers ~~provided by their devices, applications, tools and protocols~~. This may leave traces which, combined with unique identifiers and other information ~~received by the servers~~, may be used to create profiles of the individuals and identify them. It follows that identification numbers, location data, online identifiers or other specific factors as such ~~need not necessarily be considered as personal data in all circumstances~~ suggest adding the following **"can constitute personal data, but this will be dependent on the context".** For example, an IP address in a multiple occupancy house could refer to any person in that house.

		relating to" a data subject. The term "related to" lacks the precision required for a Regulation. . .	
4(2)			• As above, the definition at 4(2) should be redrafted in conjunction with Article 4(1) to introduce a single definition as under the Data Protection Directive 95/46/EC.
4(4)			• Request a scrutiny reserve in relation to structured data • Suggest clarity on what the "specific criteria" might be.
4(5)		• Article 4(5) - it is unclear the extent to which the controller would need to determine the "conditions" of processing. It is normally for the processor to determine most if not all of the conditions of processing. The controller would usually request the processor to achieve a particular outcome,	• Suggest deleting reference to **conditions** in the second and third lines of 4(5)

		leaving it for the processor to determine how this is to be achieved, especially for the larger and more established processors. This would have the unintended consequence of reducing the pool of persons that are "controllers", if all those not determining conditions are taken out of scope. • It is not considered practical to determine a threshold of conditions that need to be determined before a person is a "controller" as individuals processing situations can vary greatly. It is therefore preferable to revert to the formulation under the existing Directive. I	
4(7)		• We question the removal of: "authorities which may receive data in the framework of a particular inquiry shall not be regarded as	• Request a <u>scrutiny reserve</u> in order to assess the potential implications for domestic controllers.

		recipients", as set out in 2(g) of the 1995 Directive. It is unclear what the consequences of this would be for authorities.	
4(8)	25	• We would like to revisit this discussion in working groups, particularly whether it imposes the higher consent threshold for sensitive personal data under the existing Directive onto non-sensitive personal data. - Careful consideration should be given to how much this will cost, and whether it will deliver better data protection. We need to engage with business stakeholders to understand the impacts on business and civil rights groups. • There needs to be consistency with other pieces of legislation which rely on the definition of consent, including the e-privacy legislation. -	• Suggest <u>amending</u> **recital 25** as follows: Consent should be given ~~explicitly~~ by any appropriate method enabling a freely given specific and informed indication of the data subject's wishes, either by a statement or by a clear affirmative action by the data subject, ensuring that individuals are aware that they give their consent to the processing of personal data ~~including by ticking a box when visiting an Internet website or by any other statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of their personal data~~ Silence or inactivity should therefore not constitute consent. Consent should cover all processing activities carried out for the same purpose or purposes. IThe data subject's consent must be clear and not unnecessarily disruptive to the use of any service for which it is provided

4(10) – (16)	26		• Request <u>scrutiny reserve</u> as we will want to see how this provision interacts with later provisions in the Regulation
4(18)	29	• Having 2 definitions of a child (Article 4 (18) – under 18 threshold; Article 8(1) – under 13) complicates understanding the definition of a child.	• Request <u>scrutiny reserve</u> to consider further
4 – Suggested additional sub-paragraph			<u>additional sub-paragraph</u> to clarify definition of "competent authority" that should remain in line with the definition contained in the proposed Data Protection Directive (i.e. as set out at Article 3(14) of the proposed draft of the Directive dated 25 January.
4 – Suggested additional sub-paragraph			Suggest <u>additional subparagraph</u> to clarify definition of "third party". Suggested text: '**shall mean any natural or legal person, public authority, agency or any other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorized to process the data.**' (see suggestion that the concept of a third party is is re-introduced eg Article 6)
Chapter II - Principles			
5 – Principles relating to personal data processing			
5(a)	30		• Transparency should be clarified in the relevant sections of the Regulation rather than having a rather vague overarching principle of

			transparency
5(b)			• Suggest the qualification in the DPD 95/46/EC that further processing for historical, statistical, or scientific purposes shall not be incompatible **as long as there are appropriate safeguards** is reinstated in Article 5(b). Article 6(b) of the 1995 Directive already makes this provision and we suggest using the same wording.
5(c)		• The current DPD 95/46/EC states in recital 28 and Article 6(1(c) that personal data must be adequate, relevant and not excessive - now Article 5(c) says that personal data must be "adequate, relevant and limited to the minimum necessary for each specific purpose of the processing". - This shifts the focus away from proportionality to one where data can only be collected where explicitly justified. This will mean organisations will have to cleanse excess data and change the focus of their data collection activities. • It is not always possible	• Recommend that we revert to the original formulation in the DPD that personal data must be **"adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed".**

		to know at point of collection what 'minimum necessary' constitutes	
5(d)		• The requirement for personal data to be accurate and kept up to date, without any caveat is too prescriptive and, in certain instances will be unnecessary.	• Should be clarified that the duty to erase or rectify data "without delay" only arises once the inaccuracy of those data has been established. • Suggest 5(d) should be amended from " accurate and kept up-to-date" to "accurate and kept up to date where necessary"
5(e)		• Recommend more discretion in respect of conducting periodic review, i.e. there will be instances where there is legitimate grounds for storing records for indefinite time periods, e.g. health records • the cost implications of conducting a periodic review are very high • The qualification allowing storage for longer periods as long as solely for historical, statistical or scientific research purposes – the inclusion of the word "solely" is new –	• Recommend change in text to 'Personal data may be 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; personal data may be stored for longer periods insofar as the data will be processed solely for historical, statistical or scientific research in accordance with the rules and conditions of Article 83 and **until it becomes apparent that continued storage is no longer necessary**.' • Delete **"solely"** from paragraph 5(e) so it reads: **"…processed for historical, statistical or scientific purposes…"** as this is likely to raise issues where there are mixed purposes – for example this qualification could not be used where the dominant purpose was historical but included another purpose.
5(f)		• The burden on the controller to "ensure	• 1(f) should be amended from **"ensure and demonstrate"** to **"who shall be accountable**

		and demonstrate" compliance with the provisions of the Regulation is too onerous. • We believe that controller should not be expected to document everything as a matter of course.	**for demonstrating compliance where required by the supervisory authority".** • 5F – delete **"and liability"** – Article 5 is about general data protection principles. Liability refers to the legal consequences of particular breaches, which should be dealt with solely under Chapter IV.
6 – Lawfulness of processing	31		Recital 34 should be reworded to remove the reference to "employers
6(1)(a)	32, 33, 34	• See comments under Article 4(8) on the definition of "consent".	• We recommend reverting to the definition of consent in Article 2(h) of the DPD which states **'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.'**
6(1)(b)	35		
6(1)(c)	36		
6(1)(d)	37		
6(1)(e)	38	• The removal of the reference in Article 7(e) DPD to a third party is problematic as processing can often be carried out in reliance on the functions of the recipient rather than the disclosing party. Suggest we should say that the same wording	• Recommend reverting to wording is used as currently in a(7)(e) of the DPD, i.e. **" processing is necessary …. Or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed"**

		be used as currently in A7(e) DPD.	
6(1)(f)		• It is illogical that public authority data controllers cannot rely on their legitimate interests in order to lawfully process personal data.	• Recommend removal of **"This shall not apply to processing carried out by public authorities in the performance of their tasks."**
6(2)	40		
6(3)		• The requirement that processing under points (c) and (e) must be provided for in Union law or the law of a Member State must accommodate processing that is lawful under common law legal systems. The UK would like to discuss this further with other common law member states.	• Request a scrutiny reserve as this provision is still under consideration in order to find a suitable solution that takes into account common law legal systems
6(4)			• Recommend insert the following sentence in Article 6(4): **"Processing necessary for historical, statistical or scientific research purposes shall always be deemed compatible processing, provided it is conducted with the rules and conditions laid down in Article 83."**
6(5)		• This provision seems to give the Cion power to specify conditions	• Recommend removal of paragraph 6(5) in respect of delegated acts for the Commission

		before controllers can process on the basis of legitimate interests. These conditions are likely to narrow or alternatively define the concept of "legitimate interests", thereby cutting across an essential aspect of the Regulation	
7 – Conditions for consent			
7(1)	32-34	• If the controller has the burden of proof of establishing that the data subject gave their consent, there is less need for a formulation that the consent must always be "explicit" as per the definition in Article 4(8). • Article 7(1) is unclear - the final words "for specified purposes" might be misunderstood as qualifying when the controller has the burden of proof.	• Recommend redrafting Article 7(1) to state **"the burden of proof is on the controller to establish that consent was provided for purposes of Article 6(a)".**
7(2)	32-34	• Article 7(2) is unclear.	• Recommend redrafting to state that **"consent must be clearly indicated."**
7(3)	32-34		

7(4)	32-34	• The wording of a "significant imbalance between the position of the data subject and the controller" is difficult to define with the precision required for a Regulation, leading to uncertainty for users of the Regulation. • The qualification will remove the availability of consent from many situations where good quality consent could have provided a justifiable legal basis for processing. The provision does not support the policy aim of empowering individuals to have greater autonomy over their personal data. • The wording of Recital 34 creates confusion around the legitimacy of seeking employees' consent to certain "non-core" processing activities (e.g., employees may be	• Recommend <u>deleting</u> **Article 7(4)** and <u>replacing</u> with a recital stating: **the existence of imbalanced situations should be taken into account in determining whether consent is "freely given, and informed"**

		given the choice to opt-in to certain benefits).	
8 – Processing of personal data of a child		• Article 8(1) - There may be unintended consequences for websites aimed at children that could be classified as "information society services" – e.g. support services offering counselling about domestic abuse or sensitive medical issues. • Article 8 as presently drafted provides for no threshold on the amount or significance of children's data before parental consent is required. This means that even simple exchanges will require a disproportionate effort on the part of the child and the parent. We recognise the need for parental consent when high levels of interaction with a child occur; however, a graduated approach seems more appropriate	• Recommend that **Article 8** is removed as it is unclear how verifiable consent will be enforceable and, further, there will be instances where consent by a parent or guardian will not be appropriate, e.g. child support services. Removal of the Article would be our preference, but listed in sub-paragraphs below is suggested amendments to the accompanying provisions.

		to the risk to the child and to encourage and recognise their developing capacity as they grow.– (ie needs to take into account individual circumstances and maturity of the child rather than specifying age e.g in 8(1) 13 years) .– **We will want to discuss further at Council working group**	
8(1)	29	• There appears to be a positive obligation on controllers to seek out parental consent which we believe goes too far. • There is a real concern about social exclusion for those children whose parents or guardians are unwilling or unable to provide consent on their behalf • The need to verify consent can lead to even more personal data being requested. For example, taking parents' credit card details for	• Recommend removing **"The controller shall make reasonable efforts to obtain verifiable consent, taking into account available technology" -** this seems to put a positive obligation on controllers to seek out parental consent which seems to go too far. • Recommend clarification of what constitutes **"verifiable consent**" in the recitals or the main body of the text. • Recommend Article 8(1) should be limited to more harmful processing, e.g. services that allow users to share personal data/communicate with other users run more risk of cyber bullying, grooming and stalking than services where users are merely identified.

		verification purposes.	
8(2)			
8(3)		• Article 8(3) provides for delegated acts to further specify the criteria and requirements for ways of obtaining verifiable consent (i.e. from parents in relation to a child under 13); - this is likely to narrow the ways in which consent can be obtained which seems to cross the line into "essential" matters. This is not therefore an appropriate matter for a delegated act.	• Recommend deleting **Article 8(3)**.
8(4)		• 8(4) would enable CION to lay down standard forms for specific methods to obtain verifiable consent – uniformity in this area is unnecessary and will not deliver better data protection for individuals.	• Recommend removal of Article 8(4) - **"Commission may lay down standard forms to obtain verifiable consent"**
9 – Processing of special categories of personal data		• While sensitive personal data has always been determined by categories, this approach means that	• The UK questions the need for special categories of personal data

		information with relatively low impact on privacy can be classified as "sensitive". An example is information stating that an individual is suffering from the common cold. We would like discuss in working groups whether a new approach could be explored, where context is factored in to the assessment of whether data is truly sensitive.	
9(1)			
9(2)	41-44	• Article 9(2)(j) states that data relating to criminal convictions and related security measures can be processed "under control of official authority" but there is no indication of what this means. Does this include private organisations under some form of authorised or regulated route? Article 9(2) (j) – "criminal offences" has been removed from the	• Request a <u>scrutiny reserve</u> as it is unclear the interaction between Article 9(2)(j) and Article (2)(2)(e) in terms of the inclusion in scope of processing for criminal matters. • Recommend <u>including</u> **'criminal offences'** in 9(2) (j) in line with the content of the 1995 Directive

		1995 Directive – the processing of sensitive personal data in respect of criminal offences will be key in policing activity and should be allowable subject to the same safeguards as personal data relating to criminal convictions.	
9(3)	41-44	• Article 9(3) provides for delegated acts to specify criteria, conditions and appropriate safeguards for the processing of sensitive personal data and the exemptions in paragraph 2 - this potentially restricts the ability of controllers to process sensitive personal data by allowing specification of safeguards and exemptions. This is not an appropriate matter for a delegated power and should be removed.	• Recommend removal of **Article 9(3)** in respect of the Commission being empowered to adopt delegated acts for the purpose of specifying further categories of personal data.
10 – Processing not allowing identification	45	• If data does not permit the controller to identify a natural person, then it is outside the scope of	• Recommend deleting **Article 10** and clarifying responsibility of controllers in the recitals.

		the Regulation. We understand the policy intent of the Commission, however, clarification of what controllers are expected to do would be better placed in a recital - inclusion in the body of the Regulation may create confusion as it suggests that data at large is within scope, whether it is personal data or not.	

Annex A: Data Protection Regulation

Effect of Schengen recitals on the application of the Regulation to the UK

Summary

1. The Regulation is classified as Schengen building. The UK considers that this classification is incorrect. The effect of this classification is to exclude the UK from the Regulation[1]. The UK believes that the Schengen recitals should be removed and that the measure should not be classified as Schengen building. The UK is prepared to work with the Presidency to find a solution for the participation of the associated states.

Argument

2. Recitals 136 - 138 of the Regulation provide that that the instrument is a Schengen building measure. The Explanatory Memorandum to the proposal does not explain which elements of the Schengen acquis are affected, neither is there a Schengen recital for the UK[2].

[1] We understand that the effect is the same for Ireland.

[2] It is standard to include a Recital to set out the extent to which the UK is bound by a Schengen building measure.

3. As the Commission and the Presidency are aware, ECJ case law provides that, by analogy with what applies in relation to the choice of the legal basis of an EU act, the classification of an EU act as a proposal or initiative to build upon the Schengen acquis must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the act[1]. Accordingly, the threshold for classifying a measure as Schengen building is high (see the Council Legal Service advice on the Internal Security Fund [document 5250/12]). In short, the measure should be **essential** in terms of the realisation of the objectives of Schengen co-operation. The mere fact that it would be **desirable** or **practical** if the associated countries were bound by the proposal will not be sufficient to classify a measure as Schengen building.

4. The aim and content of the instrument is to create a horizontal framework for regulation of general commercial and public sector processing of personal data. It therefore serves a different purpose than the realisation of the objectives of Schengen co-operation. For this reason the UK considers that the Regulation has been incorrectly classified as Schengen-building.

[1] See Case C-77/05 UK –v- Council, paragraph 77.

5. Furthermore, the effect of the Schengen classification is that the Regulation does not apply to the UK at all. The Schengen Protocol (No 19) provides that the UK is not bound in any way by provisions of the Schengen acquis, unless it requests to take part in some or all of the provisions of the acquis[1]. The UK is then deemed to participate in measures that build upon these parts of the acquis unless it opts out[2].The UK participates in almost all the criminal law and policing parts of the Schengen acquis but does not participate in any aspects of the acquis that relate to border controls[3]. As the Regulation only covers areas within the former first pillar, it can only build on the parts of the Schengen acquis in which the UK does not participate, namely external borders. If a measure builds on a part of the Schengen acquis in which the UK does not participate, ECJ case law[4] confirms that the instrument would not apply to the UK at all.

6. Where a measure is classified as Schengen building for the associated states, that classification must apply for all states. It is not possible for a measure to have such a hybrid status, given that classification of a measure as Schengen must be based on objective factors amenable to judicial review. The correct approach is therefore to determine first whether the aim and content of the measure is Schengen building or not, and then to determine what the effect is for Member States and the associated states, rather than to categorise the instrument as Schengen building in order to achieve participation of the associated states.

Clearly a solution needs to be found and the UK would welcome the opportunity to work with the Presidency and the Commission to ensure that the measure is not incorrectly classified as Schengen building with the consequence that the UK is excluded. If the desire is to enable the participation of the EEA states and Switzerland then this could be achieved by either using the mechanisms provided by the EEA Agreement, and / or by parallel international agreements.

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1 See Article 4.
2 See Article 5(2).
3 We understand that this applies to Ireland as well.
4 See Cases C-77/05 UK –v- Council and C-137/05 UK –v- Council.

LIECHTENSTEIN

General remarks

During the DAPIX meetings so far, several comments have been made by different delegations concerning the question of whether the proposed regulation will cause **additional workload and/or cost** for citizens or companies. The Liechtenstein Delegation would like to add the following comments concerning this matter:

Firstly, being a small country with only limited resources that can be devoted to its administration, any additional workload or costs can pose a challenge to our administration.
Secondly, the Liechtenstein economy comprises only a limited number of larger companies that are active internationally. The big majority of companies are of small and very small size.It is well known that even a slight raise in additional workload and/or in cost has a much bigger impact on these companies compared to large ones. Therefore, they would be particularly affected by a raise in workload or cost related to the processing of personal data.

The Liechtenstein Delegation would therefore like to ask that every possible step is taken to ensure that the proposed regulation will not lead to additional workload and/or cost for citizens, companies and administration.

Art. 1

Liechtenstein is one of the few countries that have extended data protection not only to natural persons but also to legal entities The Liechtenstein Delegation notes that this is well accepted and therefore asks to be assured that, although the Commission does not envisage to extend the scope of the proposed regulation to legal entities, the proposed regulation allows a country to continue to extend its national data protection rules also to legal entities.

Art. 9 para. 1

With regard to the listed personal data that is defined as special category in para. 1, the Liechtenstein Delegation would like to inform, that according to the Liechtenstein Data Protection Supervisory Authority the Liechtenstein population does not seem to consider personal Data on religion or beliefs and on trade-union membership as special.

The Liechtenstein Delegation proposes this rule to be changed in a way to allow for a smaller set of personal data be defined as special, thus respecting the national understanding of special categories of personal data, as long as there is no cross-border aspect. This would allow for reducing the workload generated by the handling of special categories of personal data.

Art. 9 para. 2 lit. e

The Liechtenstein Delegation proposes that the german wording "… die betroffene Person offenkundig öffentlich gemacht hat …" (and its English equivalent) to be changed to „allgemein zugänglich".

Comments on Chapters I and II of the draft regulation

General remarks: The Data Protection Authority (DPA) of Liechtenstein welcomes the draft regulation in general. It shares the position of the Article 29 Working Party, published in *Opinion 01/2012 on the data protection reform proposals*, adopted on 23rd March 20121[1], the *Opinion of the European Data Protection Supervisor on the data protection reform package*, adopted on 7th March 2012[2] and the *resolution on the European data protection reform*, adopted by the European Data Protection Commissioners of 3rd and 4th May 2012.[3]

The reform package aims to strengthen data protection as a whole. However, there can be certain aspects where national legislation establishes a stronger protection in comparison to Directive 95/46/EC. Although the aim of the draft regulation is a higher degree of harmonisation, stronger legislation on the national level should be possible.

This applies in particular to **Article 1** paragraph 2 which provides that .natural persons. are protected under the new framework. In Liechtenstein, legal persons are protected as well.[4] This should be possible under the new framework as well.

We welcome the broad approach of the territorial scope in **Article 3.** Thus, data processing in third countries can also be covered. This is important from a national perspective, as there are a lot of data exchanges with Switzerland.

We also believe that the term of the .main establishment. according to **Article 4** (13) has to be further clarified as this will have important repercussions.[5]

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1 http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2012/wp191_en.pdf

2 http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinons/2012/12-03-07_EDPS_Reform_package_EN.pdf

3 http://www.cnpd.public.lu/fr/actualites/national/2012/04/spring-conference-2012/Resolution_on_the_European_data_protection_reform.pdf

4 Article 3 paragraph 1 lit. B of the Data Protection Act. See also for instance the Austrian Data Protection Act.

5 See also p. 10 of the opinion of the Article 29 Working Party.

We further welcome that the burden of proof for the data subject.s consent lies explicitly with the controller, according to **Article 7** paragraph 1.

Another positive provision is **Article 8** which introduces an explicit protection for children.

Article 10 should be clarified. The fact that the controller should not be obliged to acquire additional information should not be an .excuse. for the controller to diminish the rights of the data subjects according to Chapter III.[1]

Concerning **Article 11** the idea of more harmonise information provisions (WP 100) should be recalled.[2]

Article 14 and **15** are very important provisions which enable the data subjects to better make use of their right. These provisions also strengthen the rights. The provisions are therefore welcome. Article 14 paragraph 1 c and Article 15 paragraph 1d on the information of the storage period and Article 14 paragraph 1 e and Article 15 paragraph 1f on the information of the existence of a supervisory authority introduce new element which are particularly welcome.

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1 See also paragraph 139 of the EDPS opinion.

2 http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2004/wp100_en.pdf

NORWAY

1. GENERAL COMMENTS

Norway welcomes the proposal for a reform of the EU-rules on personal data protection. Our general impression is that the proposed legislation ensures a high level of data protection in the EU and caters for the need to modernize the data protection rules.

An area of concern is however to what extent the draft regulation offers the possibility to maintain national sectorial regulation of data protection in certain sectors, for example in the health sector, and to process personal data for purely historical purposes. The Norwegian view is that the rules on EU-level should ensure the possibility to maintain national rules on processing of personal data in the health sector and for historic and research purposes, as long as a certain level of protection of the individual is ensured.

Another concern is that the protection of personal data will interfere with the right to access public information. In our view, it is important that the EU-rules on personal data protection ensure that the right to access public information at national level can be maintained.

We would also like to point out that in our view the proposed regulation provides the Commission with a too wide range of delegated powers. In our view it must be thoroughly assessed, in relation to each provision, whether it is necessary and suitable for the Commission to be provided with power to give detailed rules on the matter in question.

Below you will find more specific comments on chapter I and II of the proposed regulation.

2. COMMENTS ON CHAPTER I

Norway supports the material and territorial scope of the draft regulation, and the definitions seem to be well worded and adjusted to the needs of practitioners.
We support a household exemption, cf. article 2 d. We are, however, concerned that the current wording is unclear. We would therefore welcome a wording that draws a more precise line between private and public use of information, for example by stating explicitly how information has to be used in order for it to be regarded as processed outside of the household sphere. In the discussions in the DAPIX-meeting, the Commission has argued that the line between private and public use is clarified in the Lindquist-ruling and that this case-law also will apply under the proposed regulation. In our view, the Lindquist-ruling does not offer the necessary clarity, taking into account that the understanding of the material scope of the regulation determines whether private persons can risk fines and other administrative sanctions. We are also concerned that some of the rules in the draft regulation are not well suited for individuals who process personal data outside of the private sphere, for example on blogs and social networks. We would therefore be interested in seeing a proposal for a simplified scheme for data processing by individuals in an every-day context.

We support the widening of the territorial scope of the regulation, but we have some comments on the drafting of article 3. It is important that the text in article 3 number 2 is drafted in a manner which also covers processing by a controller established in the union, but who is processing personal data from outside the union. The current wording seems to indicate that processors established inside the union will not fall within the scope of the legislation as long as the processing is done outside the union.

In our opinion the phrase «monitoring of their behavior» in article 3 nr. 2 b may not be sufficiently clear. We agree that the monitoring of behavior on the Internet through cookies, for example for marketing purposes, should fall within the scope of application of the directive, but we believe that this could be expressed in a clearer fashion.

3. COMMENTS ON CHAPTER II

We agree with the basic principles listed in article 5, but we have some concerns on the drafting of the provision in article 5 e and f. It is our opinion that it should be ensured that data can be processed for historical purposes, not only historical *research* purposes, and we would therefore propose the word "research" deleted from article 5 e.

We also think that the requirement in article 5 f, that the controller should demonstrate compliance with the regulation at all times, is unnecessarily strict. We believe that it will be sufficient if the controller is able to demonstrate compliance with the provisions in the regulation if asked by the supervisory authority or others. Consequently we propose that the words "be able to" should be added, so that the sentence reads: "Processed under the responsibility and liability of the controller, who shall ensure and *be able to* demonstrate for each processing operation the compliance with the provisions of this Regulation."

With regard to article 6 number 2, we have the same concerns as listed above in relation to article 5 e. We are concerned that the provision will limit the possibility for processing information for purely historical purposes without being part of an ongoing research project, since processing for historical purposes only is mentioned in relation to "research". According to for instance Norwegian archival legislation, personal data shall under certain conditions be stored even if they are not intended for a specific research project. If article 6 number 3 does not mention purely historical data because this is meant to be regulated by article 6 number 1, we can agree with this approach. We do, however, believe that this should be specified in the legal text.

We are also concerned that the proposed article 6 number 3 will limit the possibility to publish the research results, since it is unclear whether the researcher according to the proposed article 83 number 2 will need a new and separate legal ground for publishing material that has been collected for research purposes, even if the initial legal basis for processing specifically mentions publishing. We also believe that the Commission has been given a too wide range of delegated powers in article 83 number 3, but we will comment further on this when dealing with the said article.

We do not disagree with the principle of article 6 number 3. However, we find it unnecessary to include this provision in the regulation. We believe that the states should rely on their national constitutions in order to ensure that national laws meet the listed criteria. The current drafting may be read as a limitation on what legislation the states can draft at national level, and even if our impression is that this is not the intention of the provision, we feel it should be deleted.

Regarding article 6 number 4, we agree that the possible legal grounds for processing data for a purpose which is not compatible with the purpose for which the data were collected, should be limited. We would however propose to state clearly that the right to information in article 11 will apply also when there is a change of purpose for the processing of data. We also believe that the right to information should apply when there is a change of purpose, even if the purpose is compatible.

The way article 6 number 4 is drafted, it is unclear to us whether it is meant to be an absolute rule against processing personal data for purposes that are incompatible with the original purpose (as opposed to not compatible). We feel the text should be clarified on this point.

In our opinion, article 6 number 5 is an example of a provision where it is not suitable with delegated powers to the commission. Here, the Commission is provided with power to give delegated acts on what should be regarded as a legitimate interest and thus give a legal basis for processing after article 6 number 1 f. Norway believes that the further specification of this requirement should be done either by the controller in question or in national law. If it is to be specified at EU-level we believe it should be included as part of the regulation.

We agree with the substance of article 8. However, it should be clarified in the text that the conditions for processing in article 8 only will apply if processing is done on the basis of consent. We would agree to include article 8 in the framework of article 7, which specifically deals with consent.

The protection of data relating to children is of utmost importance and we fully support including rules on protecting children's data in the regulation. Realizing that binding EU rules are vital to reach such an important goal, we would like to propose to go a step further than the proposal currently does. To that effect we propose to include a general provision stating that personal data relating to children cannot be processed in an irresponsible manner contrary to the child's best interest. Such a provision gives the supervisory authorities a possibility to intervene if for example adults publish personal data about children on the Internet in a manner which may prove to be problematic for the child. We believe that such a safeguard to protect children should be included in the regulation, for example in article 5.

Norway is not opposed to the way article 9 is drafted, with specific categories of data listed as sensitive. We do however believe that not only a criminal conviction, but also that someone is suspected of committing a crime can be sensitive information. A suspicion which does not lead to a criminal conviction may in fact be equally sensitive as an actual conviction.

Our understanding of the current drafting of article 6 and article 9, is that processing of personal data which is in line with article 9 is regarded as also being in line with the requirements in article 6. We think this is a good system, but we believe that it needs to be clarified in the legal text. One way of providing the necessary clarity is by stating in article 9 that processing of sensitive data that meets the requirements in article 9 does not need to meet the test of article 6.