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from:	Slovak Republic
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) - Comments on Articles 11-27

Delegations find attached comments from the Slovak Republic on Articles 11 - 27 of the draft General Data Protection Regulation.

Article 11

We have no fundamental objections.

Article 12 (2)

In general we support the wording of this provision however we consider it necessary to distinguish automatic information obligation of controller on state of data processing on data subject and information obligation only on the data subject request on state of processing of its personal data so that we would like to support the remark of Germany stated in note no. 82 in document of PRES 8004/2/13.

Article 12 (3)

We cancel our remark stated in note no. 84. An obligation of the controller to notify DPA on refusal to provide information represents adequate guarantee against possible misuse by the controller side.

Article 12 (4)

Commenting on note no. 85 we appreciate amendment in Article 15 of the controller's possibility to require a fee which will not be excessive. Equally we consider anchoring the possibility to refuse requests of data subject when they are unfounded or excessive as beneficial. We would appreciate if it could be possible to add an obligation to controller in the case of refusal of data subject request to provide data subject with advice about his/her right to turn to DPA, which can examine such a refusal. We would also like to join to BE, LT and PL which request an explanation of "manifestly excessive" in recitals. This clarification would also contain the "manifestly unfounded".

We have no others objections to the changes and wording of Article 12 and we express our gratitude to the PRES.

Article 14

We would welcome substitution of word "context" in paragraph 1 by the word "conditions". It is our national, legally defined term under which we understand "conditions of the personal data processing shall mean the means and manner of the personal data processing, as well as other requirements, criteria or instructions concerning the personal data processing or the taking of the actions serving for achieving the purpose of the processing, whether prior to the personal data processing or in the course of their processing". In the case of support for this proposal it could be possible to incorporate this term into the Article 4 or explanation in recitals.

In Paragraph 1a point e) it seems to be unnecessary accent the purpose of direct marketing in the brackets, so we are for deleting of this part.

In Paragraph 1 point h) we are not positive with part "logic involved in the profiling". It is not clear for us at all, so we appreciate clearer reformulation of this part in the way which could provide better and stricter interpretation.

To the other changes made in wording of Article 14 we have no fundamental objections and we would like to express grateful for the work of PRES.

Article 15

We welcome the possibility to introduce an appropriate charge for the pursuit of the right of access due to unburden the controller from "speculative" requests however in relation to fundamentality of this right we consider as appropriate to refine this intervention by elaboration of provision that will warrant to data subject his/her right of enforcement of this right free of charge.

We take also problematically the provision of copies what can be again connected with problems in practise (e.g. formats). The copy can be understand as "screenshot" in .jpeg format that does not enable data subject for further processing of his/her personal data e.g. in usually used MS Office. We are the opinion that it would be more appropriate to substitute the term "a copy" by term "an access". In this case the paragraph 2 is not necessary needed and its deletion might be considered.

In case when the wording "provide a copy" will be preserved we would like to highlight the connection of "without excessive charge" only with payment of factual charges that the controller can have when providing the copies.

We would also like to join to MS which support paragraph 5 in note no. 123.

Article 17

We apprehend a political background of the right to be forgotten but in the same time we are aware its possible benefit to ensure more effective privacy for data subject. Generally we have positive approach to this right however we share a basic general attitude analogous to DE, ES, LU, NL, SI, PT and UK that the right to be forgotten is more a part of the right of privacy than the right of personal data protection. We deem positively last changes performed by PRES in document 8004/2/13 but we have still doubts like other delegations. We would like to express our support to the proposal of AT delegation as well as to subsequent Spain proposal, which solves the issue of non-existing "initial controllers" in note no. 136. We are the opinion that it is essential that the right to be forgotten will relate to search engines as well which can have a different status from initial controllers to which the current right applies. Generally we deem the provision of paragraph 2 as beneficial but we do not consider it as appropriate in relation to the controllers of search engines. In this context we would like to support the opinions of BE and DE in note no. 130. We understand doubts related to the right to freedom of expression and we are the opinion that it is not appropriate to leave the arrangement of this impact on national legislation of MS thus we would like to support the opinions of DE, DK and SI in note no. 137. In relation to the construction of the right to be forgotten and the right to erasure we are not convinced that the putting them together is a good way because it can be unfortunate.

Article 17a

We have no fundamental objections.

Article 17b

The current wording requires according to us, as well as according to BE and ES, a clear view on the concept of "disproportionate effort" in recitals. We still insist on our precedent remarks.

Article 18

We cancel our opinion from the note no. 146 because it is not executable provision. The limitation of paragraph 2 to private sector changed our opinion. We would also like to support the delegations stated in note no. 150.

SK welcomes the elaboration of data portability and we consider it a tool which may contribute to competitiveness of small and medium enterprises. SK welcomes in general current text of the presidency which is aiming towards the right direction however we consider it necessary to develop it further. SK therefore supports the current compromise, which is a good base for further development. We do not consider it necessary to specify that the right to data portability is limited only to the data concerning the data subject as it results from the logic of the Regulation proposal. SK agrees with proposals of MT and DE which introduced the proposal that the form in which the data shall be provided to another controller should be as technologically neutral as possible to prevent disproportionate administrative burden for controllers

Article 19 (1)

We join to delegations in note no. 155 which ask to erasure the reference to Article 6(1) (e). We also support delegations stated in note no. 162.

Article 20

We deem the current wording as a forward step but we still consider it as open. We are interested in German conception of their legislation in this field and we are curious about the future German's proposals for this provision thus we would like to apply a scrutiny reservation to whole article in regard to its controversy. We deem positively the revised paragraph 3 in exception of (b). We are not really sure if the possibility of the special categories of personal data processing should be created for profiling. We do not incline positively to this possibility. In our basic position we prefer that the profiling should be adjusted to services of information society with using the pseudonymised data. The profiling of special categories of personal data should be allowed only to public sector based on the European legislation related with public interests and measures which are necessary in a democratic society to ensure its important interests (e.g. public security, safety, defense, etc.).

Article 21

We affiliate to IT and NL remark in note no. 170 and we also request to add the possibility to provide derogations for statistical purposes. We appreciate paragraph 2 positively and we express our support to it.

Article 22

We appreciate the emphasizing of "risk based approach" namely in the context of changes in recitals (60-60c). We support such an approach and we consider it a key for a relocation of administrative burden to data protection officer. We agree with connection to mechanism of certification in paragraph 2b but we consider as more appropriate to move this legal provision rather to the provision of Article 39. We would like to express our gratitude to the PRSE and concerned delegations, especially to France delegation, thanks to what this provision have been improved. At the same time we support those delegations favouring the further development of the risk concept in normative wording of the Regulation proposal.

Article 23

We support DE in its reasoning stated in note no. 185 but we have a positive approach to these provisions by now.

Article 24

We express general support to new wording. In our opinion, the original vague of this provision was adjusted as well as a problem with unclear performance of data subject rights. We estimate very positively paragraph 2 and we support it although we have a fear about its possible language problems but we do not consider it as crucial issue. However, we have still problem with the fact that the form of agreement between joint controllers is not further defined or explained. Just an agreement specifying the respective responsibilities is crucial in this respect and not only in terms of eliminating opacity of responsible relations arising from outsourcing. Perhaps it would be appropriate to explain the problem in a recital of the preamble even in the context of SE remark in no. 346, forasmuch we are the same opinion that the allocating respective liability between public authorities should be done by legislation. In relation to the fact that an agreement as such can be concluded verbally, taking into account status of the controller, its competences as well as its responsibility, it is essential to impose to him an obligation to conclude the agreement in writing. The merits of such a requirement arise for example from the need for any accountability for the breach of duties relating to the processing of personal data. Otherwise, a joint and several liabilities will apply. The written form of the agreement is therefore necessary in the term of legal certainty not only between controllers each other but also between controllers and data subjects.

Article 25

We propose to leave wording of the paragraph 2 point a. According to us it is not desirable to exclude from the scope of this provision a representative of controller from any third country except the controllers, who are part of government structures of third countries and they process personal data in connection with the exercise of official authority, respectively it is a public authority which may be subsuming under the point c. We would also support the SI in its proposal stated in footnote no. 356 in document of PRES 8004/13. We have an appropriate term for this in Slovak language which can be compare with “public authorities”.

We appreciate embedding of risk-based approach in paragraph 2 point b. However, we have proposed in our previous position to take also in consideration other criterions, ex. scope of data processing, number of concerned data subject or number of persons responsible for automatic data processing. It is an issue of consideration and common consensus if the scope of criterions should not be enlarged for more criterions as for example company size and risk of data processing. According to us, the proposed provision is not suitable as far as the criteria of high risk will be further specified.

We propose to reformulate accordingly the wording of paragraph 2 point c, respectively delete it to be clear that the obligation to designate a representative relates to all controllers who perform data processing pursuant to Article 3 (2). The protection of personal data has the same legal content regardless of who is the subject of personal data processing.

Article 26

In this article remain absent modification of whom, at what time and in what way it will inform data subject on election of processor, what is necessary to incorporate to this article. We support the emphasizing of explicitness in paragraph 1 by inserting the words "use only". We welcome the connection with the mechanism of certification and it has our support. The changes made by PRES in paragraph 2 have a right direction. The content of an agreement between the controller and processor could be supplemented by even more essentials as for ex. list of permitted processing operation etc. We apprehend this specification very positively too. We have still a few questions regarding to the possibility of involvement of other processors to the personal data processing from the part of the processor in paragraph 2(d). Essentially we support it as well as in the concept of WP 29 opinions related to subcontractor nonetheless it is not clear for us how the basic question on responsibility will be solved in these cases. We have a concept in our national provision based on the fact that the processor performs the data processing personally unless he/she did not agree with the controller in written agreement that the data processing will be carried out by other person ("subcontractor"). The subcontractor performs the data processing on behalf and responsibility of the processor whereby the subcontractor is also subject to provisions of our "PDP Act" related to the processor so as we make difference between two qualities of processors with the aim to provide greater flexibility to sectors for outsourcing and at the same time to assign expressly the responsibility. We miss the same construction in the case of involving of "secondary" controllers. We support new wording of Article 26(3) and the deletion of the paragraph 4 is fine.

SK still same as BE and HU consider it necessary to incorporate a definition of a sub-processor into the Article 26 which shall improve the legal certainty in mutual relationships between controllers and processors. Therefore we propose incorporation of a paragraph 2a in Art. 26 which shall read: *„The processor exercises personal data processing in person, unless it is stipulated in the contract with the controller that the personal data processing shall be exercised at the hand of a different subject (hereinafter the „sub-processor"). The sub-processor processes personal data and provides their protection on processor´s liability. Provisions of this Regulation regarding the processor are binding also for the sub-processor. For the purposes of this Regulation the sub-processor is considered as the processor. "*

SK welcomes elaboration of a possibility to adjust the contractual relationship between controllers and processors by means of standard contractual clauses in Article 26 (2a), (2b) and (2c) however we still consider it necessary to cover this area similarly as it is with cross-border transfer. Standard contractual clauses between controllers and processor should be mandatory which would not prohibit controllers and processors from negotiation of other contractual provisions freely. Standard contractual clauses should therefore be a mandatory part of a contract. Current provisions of the Regulation proposal do not bring solution to disadvantageous position of small and medium enterprises. These enterprises are often in the position where they are not able to negotiate desirable adaptation of personal data protection into contracts with their contractual partners. In our opinion, elaboration of mandatory standard contractual clauses eliminates these situations.

Therefore we propose following alteration of Article 26 (2a): *„Without prejudice to an individual contract between the controller and the processor, the contract referred to in paragraph 2* ***shall*** *be based on standard contractual clauses referred to in paragraphs 2b and 2c or on standard contractual clauses which are part of a certification granted to the controller or processor pursuant to Articles 39 and 39a."*

SK consider elaboration of recital no. 63a as a positive step however we propose a small alteration to this provision in following manner: „*To ensure compliance with the requirements of this Regulation in respect of the processing to be carried out by the processor on behalf of the controller, when entrusting a processor with processing activities, the controller* ***shall*** *use only processors providing sufficient guarantees, in particular in terms of expert knowledge, reliability and resources, to implement technical and organisational measures will meet the requirements of this Regulation, including for the security of processing."*