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from: Presidency  
to: Working Group on Information Exchange and Data Protection (DAPIX)  
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Subject: Specific issues of Chapters I - IV of the General Data Protection Regulation  
- Pseudonymous data  
- Profiling

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**I. Background**

1. During the 2013 June JHA Council, Ministers discussed key issues on the proposal for a Regulation setting out a general EU framework for data protection on the basis of a document prepared by the Irish Presidency (11013/13). Delegations generally welcomed the considerable progress achieved on the draft Regulation under the Irish Presidency. On the understanding that no part of the draft Regulation can be agreed until the whole text of the regulation is agreed, it was concluded that the amended text of chapters I to IV was a good basis for further progress on the proposal for a Regulation. This has been maintained in the compromise text prepared by the Lithuanian Presidency (17831/13).

2. With this understanding, the Presidency proposes to focus the discussions of the Working Party on specific issues stemming from chapters I-IV which require further consideration, starting with the issue of pseudonymous data and the provisions on profiling.

## II. Pseudonymous data

### **Content of the current presidency compromise text**

3. The issue of **pseudonymous data**, which is personal data, has been addressed in the context of the request of Member States for a strengthened risk-based approach in the text of the draft Regulation. During the March 2013 JHA Council it was concluded that the work on the risk-based approach should be continued by, *inter alia*, further exploring the use of pseudonymous data. More specifically, the question has arisen whether, and if so how, the use of pseudonymous data could contribute to the calibrating of controllers' and processors' data protection obligations while maintaining protection levels.
4. To this effect the following aspects have been integrated in the compromise text of chapters I to IV of the draft Regulation:
  - a definition of "pseudonymous data" as: "personal data processed in such a way that the data cannot be attributed to a specific data subject without the use of additional information, as long as such additional information is kept separately and subject to technical and organisational measures to ensure non-attribution" (Article 4(2a));
  - a reference to the fact that the processing of personal data for the purposes of anonymising or pseudonymising personal data can be considered as a legitimate interest of the controller and thus constitute a legal basis for processing provided that the interests or the fundamental rights and freedoms of the data subject are not overridden (Recitals 38 and 39);

- a reference to the fact that where the data processed by the controller do not permit the controller to identify a natural person, for example by processing pseudonymous data, the data controller should not be obliged to acquire additional information in order to identify the data subject for the sole purpose of complying with any provision of the Regulation (Recital 45 and Article 10);
- a reference to "pseudonymous data" as an example of a measure to protect the data subjects' legitimate interest when there is an exception to the data subjects' information rights (Article 14a(4b));
- a reference to the use of pseudonymous data as an example of how the controller can implement technical and organisational measures appropriate to the processing activity in the context of data protection by design (Article 23(1)) or security of processing (Article 30(1));
- a derogation from the communication of a data breach to the data subject when the controller has implemented appropriate technological protection and measures, in particular those that render the data unintelligible such as the use of pseudonymous data (Article 32(3)(a));
- a provision according to which associations and other bodies representing categories of controllers or processors may prepare codes of conduct for the purpose of specifying the application of the use of pseudonymous data (Article 38(1a)(bb)).

### **Further considerations**

5. Whilst the discussions have shown that there is an overall support for strengthening the risk-based approach by making use of pseudonymous data, some Member States still question the added-value of a positive definition of "pseudonymous data", also in light of the often unclear boundaries of this sub-category of personal data, of the articulation with anonymous data and of the risks to create possible gaps of protection. Some clarification could be achieved by replacing the current definition of "pseudonymous data" by a reference to a process supporting compliance with data protection requirements of the Regulation ("pseudonymisation").

6. In this context, the Presidency invites delegations to indicate:

- a. Whether they support the compromise reached, namely the definition of "pseudonymous data" and corresponding calibrations of specific provisions of the draft Regulation mentioned above under point 4.
- b. If not, whether delegations favour replacing the definition of "pseudonymous data" by a reference to a process supporting compliance with data protection requirements of the Regulation ("pseudonymisation"). The articles of the draft Regulation mentioned above under point 4 (together with the corresponding recitals) would then be adapted accordingly.

### III. Profiling

#### **Content of the current presidency compromise text**

7. As regards **profiling** the compromise text of chapters I to IV of the draft Regulation foresees:
  - a definition of profiling which circumscribes profiling to "any form of automated processing of personal data intended to create or use a personal profile by evaluating personal aspects relating to a natural person, in particular the analysis and prediction of aspects concerning performance at work, economic situation, health, personal preferences, or interests, reliability or behaviour, location or movements" (Article 4(12a));
  - specific information requirements on the existence of profiling as well as the significance and the envisaged consequences of such profiling of the data subject (Articles 14(1a)(h) and 14a(2)(h));
  - a provision regulating profiling (Article 20) which
    - enshrines the principle that every data subject has the right not to be subject to a decision based solely on profiling (Article 20(1));
    - requires that the decision based solely on profiling produce legal effects or "severely affects" the data subject (Article 20(1));

- prohibits profiling based on special categories of personal data unless one of the grounds foreseen in Article 9(2) applies provided that "suitable measures to safeguard the data subject's legitimate interests are in place" (Article 20(3)).

### **Further considerations**

8. Whilst the compromise text addresses various concerns, some delegations prefer that the definition of "profiling" is identical to that of the Council of Europe Recommendation CM/Rec (2010)13 on the protection of individuals with regards to automatic processing of personal data in the context of profiling, which reads:
  - d. 'profile' refers to a set of data characterising a category of individuals that is intended to be applied to an individual;
  - e. 'profiling' means an automated processing technique that consists of applying a 'profile' to an individual, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours or attitudes."
9. Another option could be to follow the logic of Directive 95/46/EC which ensures that the protection that an individual is entitled to regarding automated processing of personal data is *not* linked to the creation or existence of a "profile". This additional requirement of a "profile" could reduce the current level of protection. On this basis a possible definition could read:

“'profiling' means automated processing of personal data intended to evaluate certain personal aspects relating to a natural person, such as his or her performance at work, economic situation, health, personal preferences, or interests, reliability or behaviour, location or movements.”
10. It may also be necessary to ensure further alignment between the regime of profiling and that applicable to sensitive data. This could be done by clarifying in Article 20(3) that profiling based on special categories of personal data could take place only with the explicit consent or for important reasons of public interest, in accordance with points (a) and (g) of Article 9(2).

11. Therefore, the Presidency invites delegations to indicate:

- Whether they support the current compromise text on the issue of "profiling" as mentioned above under point 7 and whether they consider that the definition of "profiling" should

- a) be kept as in the current compromise; or
- b) be identical to that of the Council of Europe; or
- c) remain in line with the logic of Directive 95/46/EC.

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