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NOTE

From: Presidency
To: Delegations

Subject: Preparation of the Council position and findings on the application of the General Data Protection Regulation (GDPR)

Delegations will find in Annex the Presidency suggestion for a draft Council position and findings on the application of the General Data Protection Regulation (GDPR). The suggestion will be discussed at the DAPIX meeting on 21 October 2019.

1. Introduction

(1) The General Data Protection Regulation ('GDPR')¹ entered into application on 25 May 2018, repealing and replacing Directive 95/46/EC. The GDPR aims to create a strong and more coherent data protection framework in the EU, backed by strong enforcement. The GDPR has a two-fold objective. The first one is to protect fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data. The second one is to allow the free flow of data and the development of the digital economy across the internal market.

(2) According to Article 97 of the GDPR, the Commission shall submit a first report on the evaluation and review of the Regulation to the European Parliament and the Council. That report is due by 25 May 2020, followed by reports every four years thereafter.

(3) In this context, the Commission shall examine, in particular, the application and functioning of:

- Chapter V on the transfer of personal data to third countries or international organisations with particular regard to decisions adopted pursuant to Article 45(3) of this Regulation and decisions adopted on the basis of Article 25(6) of Directive 95/46/EC; and
- Chapter VII on cooperation and consistency.

(4) The GDPR requires that Commission takes into account the positions and findings of the European Parliament and the Council, and of other relevant bodies and sources. The Commission may also request information from Member States and supervisory authorities.

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

(5) In order to prepare the aforementioned Council positions and findings, delegations were requested to send written comments². Member States' comments were discussed at the DAPIX working party in its meetings of 21 October, 11 November [and 5 December] 2019. The Council positions and findings based on that preparatory work are outlined and summarised in this document. The Council has also taken note of the Commission's 'Communication on data protection rules as a trust-enabler in the EU and beyond – taking stock'³(the Communication) that was adopted in July 2019. The Communication looked at the impact of the EU data protection rules and at the possibilities of improving the implementation further. While the new data protection rules have, according to the Commission, achieved many of their objectives, the Communication also sets out concrete steps to further strengthen these rules and their application.

(6) The Council takes the view that its positions and findings should not be limited to the topics specifically mentioned in Article 97(2) of the GDPR and. Therefore, the Council encourages also the Commission to evaluate and review in its upcoming report the application and functioning of the GDPR beyond what is specifically mentioned in that Article. Given the importance and impact of the GDPR in an ever-developing digital society, there are strong arguments supporting a broader review and discussion on the topic.

(7) At the same time, the Council highlights that the GDPR has only been applied since May 2018. Therefore, it is likely that several issues identified by Member States will greatly benefit from more experience in the application of the GDPR. Further guidance and a possibility to exchange information on national practices would also be useful for Member States.

(8) The Council has made a number of detailed observations on the application of the GDPR. In this document, the Council outlines certain topics that have been considered particularly relevant by Member States. Those issues should also be reflected in the upcoming report of the Commission in an appropriate manner.

² 12756/19 REV 1

³ 11535/19

2. General remarks

(9) In the view of the Council, the GDPR has largely been a success. It is an important instrument and a milestone that strengthens the right to the protection of personal data and fosters trust-enabling innovation in the EU. The GDPR has also further increased awareness of the importance of data protection both in the EU and abroad.

(10) At the same time, the Council notes that new phenomena, particularly emerging technologies, also provide new challenges for the protection of personal data. Those challenges relate to topics such as big data and discrimination and the use of artificial intelligence and blockchain technology. It is necessary to assess within the next few years whether and to what extent the GDPR is able to respond to the new challenges.

(11) The Council also acknowledges the important role of national supervisory authorities in the functioning and consistent application of the GDPR and notes the positive developments as regards the significantly increased allocation of resources to the data protection authorities in many Member States. The Council also shares the view of the Commission on the importance of cooperation among the supervisory authorities of the Member States, particularly within the European Data Protection Board (EDPB). This cooperation should be further strengthened.

3. Margin left for national legislators

(12) The GDPR is directly applicable in all Member States. As pointed out by the Commission in its Communication, one key objective of the GDPR was to move away from the fragmented landscape of 28 different national laws that existed under Directive 95/46/EC and to provide legal certainty for individuals and businesses throughout the EU. The Council considers that the GDPR has to a large extent contributed to this objective.

(13) However, the GDPR leaves a margin for a national legislator to maintain and introduce more specific provisions to adapt the application of certain rules of the GDPR. The margin is included in several articles of the GDPR. The Commission indicated in its Communication that it would pay particular attention to the national measures relating to the use of this margin for specification. According to the Commission, the national legislation should not introduce requirements going beyond the GDPR when there is no margin for specification, such as additional conditions for processing.

(14) A number of Member States have pointed out that the national margin has possibly resulted in a more fragmented legal landscape than was originally foreseen. At the same time, the Council notes that an adequate margin for national legislators was deemed necessary when the GDPR was negotiated.

(15) For example, Article 6(2) and (3) of the GDPR leave a rather wide national margin to maintain or introduce more specific provisions to adapt the application of certain legal bases for the processing of personal data. The national margin included in Article 6 has also resulted in numerous national rules concerning the lawfulness of processing of personal data in some Member States. Under Article 6(2), such national rules are possible as regards the basis for processing necessary for compliance with a legal obligation or for the performance of a task carried out in the public interest. According to Article 6(3) of the GDPR, these national rules may contain specific provisions on, for instance, the general conditions governing the lawfulness of processing by the controller, the purpose limitation and storage periods.

(16) A margin for national legislators has also been included in Article 8 of the GDPR, which provides for the age of consent of a child in relation to information society services ranging from 13 to 16 years. This has resulted in Member States adopting differing age limits. While a majority of Member States did not raise the differing age limits as an issue, a couple of Member States thought that this was problematic and suggested to consider the introduction of a uniform age limit. A couple of Member States also considered the different ages of consent have given rise to legal uncertainty concerning the applicable law among the Member States.

(17) Yet, the Council notes that the GDPR and the national rules complementing it have only been applied for a short while. Sector-specific legislation is still being revised in many Member States. Therefore, it might be too early to draw definite conclusions on the overall level of legal fragmentation in the EU. However, the Council deems the issue important and calls for examining this topic closely in the upcoming years before the Commission may, where appropriate, table a proposal for legislative amendments.

(18) The Council also stresses the need to prevent the EU legal landscape from fragmentation as regards the protection of personal data. EU directives and regulations that contain provisions on the processing of personal data should be consistent with the GDPR or, if applicable, Directive (EU) 2016/680⁴. Data protection should also be taken into account in an appropriate manner when creating policies that affect the processing of personal data.

4. International transfers

(19) In its Communication, the Commission pays attention to the positive trend as regards the development of data protection rules at a global level. There is an increasing number of parties to the Council of Europe Convention 108 that has been recently revised. At the same time, countries across the world are modernising their regulatory frameworks on data protection.

(20) The Council finds that the adequacy decisions are the most essential tool available for the controllers to transfer personal data safely to third countries and international organisations. In this respect, the Council also finds it important that the adequacy decisions are based on compliance with the criteria set for such decisions and are subject to regular review as required by Union law. The Council supports the Commission's intention expressed in its Communication, to further intensify its dialogue on adequacy with qualifying key partners, including in the area of law enforcement. The Council also welcomes the Commission's plan to report in 2020 on the review of the 11 adequacy decisions adopted under Directive 95/46/EC.

⁴ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

(21) The Council pays attention to the fact that for the time being, there are only 13 adequacy decisions in force, including the Privacy Shield for the United States. Consequently, the controller needs to resort to other tools offered by Chapter V of the GDPR in many situations when transferring personal data to third countries. Therefore, the Council shares the view that it is also important to address the application of other tools for international transfers under Chapter V of the GDPR. Those tools include legally binding and enforceable instruments between public authorities or bodies, binding corporate rules, standard data protection clauses adopted by the Commission or by a supervisory authority and approved by the Commission, as well as approved codes of conduct or certification mechanisms together with binding commitments of the controller or processor in the third country.

(22) Member States have noted that the application of some of the aforementioned tools would benefit from further clarification and guidance. For example, some Member States have pointed out that, in the absence of an adequacy decision, the controller may find it difficult to determine what may be considered appropriate safeguards of data protection referred to in Article 46 of the GDPR. In the Council's view, clarification would be welcome.

5. Administrative burden

(23) The administrative burden to comply with the GDPR is an issue that has raised concerns among Member States. According to the Communication, although the situation varies between Member States, small and medium-sized enterprises (SMEs) have been among the stakeholders with the most questions about the application of the GDPR. According to information from some Member States, the SMEs are dissatisfied, for example, with the limited derogation from the obligation to maintain a record of processing activities. Article 30 (5) of the GDPR exempts enterprises or organizations employing fewer than 250 persons from the requirement to maintain a record of processing activities, but only under a set of strict conditions.

(24) Another example of administrative burden on SMEs is the obligation to notify the supervisory authorities of personal data breaches and to document such breaches (Article 33 of the GDPR). That obligation does not only create administrative burden on controllers, but also on the supervisory authorities handling the notifications. There could even be a risk of parallel handling of the same case by several authorities. According to information received from Member States, the number of notifications made so far at the EU level gives reason to examine the application of Article 33 more closely.

(25) Although under recital 13, Member States and their supervisory authorities ‘are encouraged to take account of the specific needs of micro, small and medium-sized enterprises in the application of this Regulation’, the Council agrees that some further guidance and support for SMEs could be useful.

6. Cooperation and consistency mechanisms

(26) The cooperation and consistency mechanisms (one-stop shop) are, in the Council's view, key instruments to ensure a high and consistent level of protection of personal data throughout the EU. It is expected that the application of those mechanisms will result in a number of important decisions and guidance documents in the near future, thereby contributing to a clearer understanding and consistent application of the GDPR.

(27) However, Member States have mentioned some challenges concerning the cooperation and consistency mechanisms. Furthermore, while the cooperation and consistency mechanisms are considered important elements of the new regulatory framework, and the supervisory authorities are strongly encouraged to cooperate, attention has also been drawn by some Member States to the administrative burden and human resources implications of the new mechanisms.

7. Representatives of controllers or processors not established in the Union

(28) Member States have drawn attention to the possibility that controllers or processors not established in the Union might not comply with their obligations set out in the GDPR. One of those obligations is the requirement under Article 27 for controllers and processors to designate a representative in the Union and the failure of some controllers established in third countries to comply with their obligation. It is uncertain to what extent controllers established in third countries have complied with that obligation but according to information from Member States, there are cases where a representative has not been designated.

(29) Furthermore, under Article 30(2), the processor's representative shall maintain a record of all categories of processing activities carried out on behalf of a controller, which shall be made available to the supervisory authority on request. It is not entirely clear what the supervisory authority can do in situations where the representative does not comply with their obligations. Some guidance in this regard would be useful in order to ensure effective enforcement. It would also be helpful to have up-to-date information on the extent to which controllers or processors not established in the Union have designated a representative as required by Article 27.

8. Conclusions

(30) This document outlines those issues of application and interpretation of the GDPR that have raised most concern in the Member States so far. The concerns relate, in particular, to: 1) the potential fragmentation of legislation, which may result from the possibility of the Member States to maintain or introduce more specific provisions to adapt the application of the rules of the GDPR; 2) the challenges of the determination of adequate safeguards in the absence of an adequacy decision; 3) the administrative burden caused by certain provisions of the GDPR; 4) the administrative burden relating to the cooperation and consistency mechanisms under Chapter VII of the GDPR, as well as the resource implications of those mechanisms; and 5) the lack of guidance for situations where controllers established in third countries fail to designate a representative in the Union.

(31) However, there is also a large number of issues relating to other provisions of the GDPR that have been raised by individual Member States. While the Council acknowledges that the large number of questions is mainly due to that the GDPR has only been applied for a short time, the Council considers that they would need to be addressed in one way or another. The Council agrees that many of the issues raised by the Member States are questions of interpretation that could be resolved for example through further guidance, although some materials are already available. The Council acknowledges the role of the EDPB and national supervisory authorities in the provision of guidance, and the role of the supervisory authorities in the approval of codes of conduct developed for categories of controllers or processors.

Furthermore, many of these issues and topics would deserve further discussions and sharing of experiences between the Member States and the Commission in an appropriate forum, such as an expert group.

(32) The Council pays attention to the risk of fragmentation of legislation relating to the margin of the Member States to maintain or introduce more specific provisions to adapt the application of the rules of the GDPR. While that margin has been intentional for the specification of certain provisions of the GDPR, the Council considers that the developments in this respect should be closely followed. In addition, the Council supports the objective to take data protection aspects and the GDPR into account in relevant fields of EU policy and law making.

(33) As regards Chapter V, the Council encourages the Commission not only to review the existing adequacy decisions but also to examine the possibilities to adopt new adequacy decisions. At the same time, the Council shares the view that it is equally important to address the application of the other tools available under Chapter V to provide controllers with more information on appropriate safeguards could be considered to exist in the absence of an adequacy decision.

(34) As regards Chapter VII, the Council notes that some concerns have been raised as described in the foregoing. However, the Council considers that it is mainly for the supervisory authorities and the EDPB to address them. The Council considers that the cooperation among the supervisory authorities should be further strengthened. In this context, the relevance of the resources of the national supervisory authorities and of the EDPB should be addressed in the Commission's upcoming report.

(35) Finally, the Council encourages the Commission to take a broad view in the upcoming report, going beyond Chapters V and VII that are explicitly mentioned in Article 97 of the GDPR. While it might be premature to re-open the GDPR, the Commission should consider addressing at least some of the issues relating to the aforementioned topics, and suggest appropriate means to resolve them. Furthermore, with a view to preparing for subsequent reports under Article 97, the Commission should continue monitoring and analysing the experiences of application of the GDPR, particularly as regards the issues outlined in this document. The Council also encourages the Commission to monitor within the next few years whether and to what extent the GDPR is able to respond to challenges provided by new technology.
