



Brussels, 19 October 2023
(OR. en)

14397/23

LIMITE

DATAPROTECT 280
JAI 1335
DIGIT 224
MI 873
FREMP 294

NOTE

From: General Secretariat of the Council
To: Delegations
Subject: Council position and findings on the application of the GDPR
- Consultation of Member States

Following the meeting of the Working Party on Data Protection held on Wednesday 11th October 2023 and the subsequent request for written comments (CM 4816/23), delegations will find in Annex I an updated Presidency proposal for a draft Council position and findings on the application of the GDPR. All substantial changes compared to the latest version are indicated in **bold and underline** or **~~strikethrough~~**. (The text has also been subject to a first editorial and linguistic review by the GSC. To facilitate the reading, the changes resulting from this review do not appear in the text; they do not affect the substance of the latest version).

For delegations' convenience, a clean version of this updated Presidency proposal is also available in Annex II of this document (same text as in Annex I, but without any change appearing).

Delegations are informed that, unless they have serious objections to this text to be communicated by Thursday 26th October at 12:00, the Presidency intends to inscribe ST 14397/23 (as amended by the jurist-linguistes) as an 'I' items at Coreper on 8th November 2023. As usual, an accompanying note will then be issued. Possible objections should be addressed to the GSC at jai.data.protection@consilium.europa.eu, etienne.maury@consilium.europa.eu and the Presidency at lola.villar@reper.maec.es, esperanza.zambrano@mjusticia.es, ruth.alvarez@reper.maec.es.

Council position and findings on the application of the GDPR**1. INTRODUCTION**

- (1) The General Data Protection Regulation ('GDPR')¹ became applicable on 25 May 2018, repealing and replacing Directive 95/46/EC. It aims to create a strong and more coherent data protection framework in the EU, with a two-fold objective of both protecting fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data, and allowing the free movement of personal data within the Union.
- (2) According to Article 97 of the GDPR, every four years as of May 2020, the Commission shall submit a report on the evaluation and review of the Regulation to the European Parliament and the Council.
- (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.

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).

- (4) The GDPR requires that Commission takes into account the positions and findings of the European Parliament, of the Council, and of other relevant bodies or sources. The Commission may also request information from Member States and supervisory authorities.
- (5) Anticipating the first GDPR evaluation and review by the European Commission in accordance with Article 97, on 15th January 2020, the Council adopted its first *Council position and findings on the application of the General Data Protection Regulation (GDPR)* outlining the issues relating to the application and interpretation of the GDPR that had raised most concerns in Member States at the time, in particular in relation to 1) the challenges of determining or applying appropriate safeguards in the absence of an adequacy decision; 2) the additional work for the supervisory authorities resulting from the cooperation and consistency mechanisms under Chapter VII of the GDPR, as well as the resource implications of those mechanisms; 3) the unforeseen fragmentation of legislation; 4) new obligations for controllers and processors in the private sector introduced by certain provisions of the GDPR; and 5) the steps to be taken by the supervisory authorities to tackle situations where controllers established in third countries fail to designate a representative in the Union.
- (6) While acknowledging the role of the European Data Protection Board ('EDPB') and national supervisory authorities in providing guidance, the Council had furthermore highlighted specific areas to which further attention should be paid, in particular: the application of the GDPR in the field of new technologies as well as the issues related to big tech companies; the practical tools for small and medium-sized enterprises ('SMEs') and charitable or voluntary associations, such as a harmonised form for controllers and processors to notify the supervisory authorities of personal data breach, or a simplified record of processing, as well as other appropriate tools for SMEs to apply the GDPR in view of their specific needs; efficient working arrangements of supervisory authorities in cross-border cases; and issues relating to situations where a representative of a controller or a processor established outside the EU does not comply with its obligations.

- (7) On 24 June 2020, the European Commission adopted the Communication from the Commission to the European Parliament and the Council entitled “Data protection as a pillar of citizens’ empowerment and the EU’s approach to the digital transition - two years of application of the General Data Protection Regulation”, noting in particular that to meet the full potential of the GDPR, it was important to create a harmonised approach and a European common culture of data protection, and to foster a more efficient and harmonised handling of cross-border cases. Based on its evaluation, the Commission listed a series of actions identified as necessary to support the application of the GDPR with a view to implementing and complementing the legal framework, making the new governance system deliver its full potential, supporting stakeholders, encouraging innovation, further developing the toolkit for data transfers, and promoting convergence and developing international cooperation.
- (8) With a view to preparing this second Council position and findings on the application of the GDPR, and in order to feed into the second Commission report due in 2024, the Presidency drew up a text based on comments provided by the Member States after a series of exchange of views at the meetings of the Council Data Protection Working Party on 24 July, 12 September and 11 October 2023. Member States were notably asked to identify areas or sectors where the GDPR could be considered to be effectively implemented, to report on practical implementation at national level, to take stock of the international dimension of the GDPR and to provide their views regarding the application and enforcement of the GDPR vis-à-vis non-EU companies active on the EU market.
- (9) The Council position and findings based on that preparatory work are outlined in this document. In addition to the first implementation report adopted by the Commission in 2020, the Council has also taken note of the Commission’s proposal for a Regulation laying down additional procedural rules relating to the enforcement of the GDPR², presented in July 2023, which is currently also being discussed within the Council Working Party on Data Protection.

² COM/2023/348 final

- (10) The Council highlights the fact that this is the first opportunity to evaluate the GDPR over a substantial period of more than five years since its effective application began, in accordance with its Article 97. This position benefits, in consequence, from a more significant experience by Member States in the application of the GDPR. The practical experience of national supervisory authorities in enforcing and monitoring the application of the GDPR, the adoption of guidance and binding decisions by the EDPB, as well as relevant court rulings - including by the Court of Justice of the European Union (CJEU) - can also be stressed as important elements taken into account. The challenges, concerns and points of attention identified by the Council in 2020, as well as the list of actions laid down by the Commission in its subsequent Communication, have furthermore been considered as references for the development of the current position and findings.
- (11) As it was the case in 2020, the Council's view is that its position and findings should not be limited to the topics specifically mentioned in Article 97(2) of the GDPR. With that in mind, the Council continues to encourage the Commission to take the opportunity of its upcoming report to evaluate and review the application and functioning of the GDPR beyond what is specifically mentioned in that Article. A comprehensive scope of evaluation is even more justified by the fact that, since last report adopted in 2020, the practical experiences and inputs from relevant stakeholders and organisations have further developed, and the regulatory landscape has evolved significantly, with several legislative instruments adopted at EU level impacting on the processing of personal data and interacting with the GDPR.

2. GENERAL REMARKS

- (12) In the view of the Council, the GDPR continues to be a success. The Regulation has led to positive outcomes for the harmonisation of EU law and the strengthening of a data protection culture at EU **and global** level. Its application has enhanced trust and legal certainty, facilitated cross-border data flows within the EU, thus benefiting the internal market and the development of the digital economy.

- (13) Five years on from the beginning of its effective application, the GDPR continues to represent an important milestone that has strengthened the fundamental rights to respect for private and family life, home and communications privacy, and to the protection of personal data (Articles 7 and 8 of the Charter of Fundamental Rights of the European Union), by providing European citizens with an equal level of protection and allowing them to have more control over the processing of their personal data. Data subjects' rights have been reinforced and the awareness, knowledge and understanding of data protection rights have increased among the general public. The GDPR has had a positive effect on transparency and data subjects' empowerment, as reflected in the increased in the exercise of data subjects' rights, including their new ones.
- (14) The guarantees for the lawfulness of the processing of personal data have also been reinforced in practice and the application of GDPR provisions has played a significant role in increasing the transparency and security of personal data processing. Controllers and processors are more aware of their obligations and of the consequences of processing that is not compliant with the GDPR. The accountability of entities subject to the GDPR has strengthened and compliance efforts have also had a positive impact on data governance within organisations in general.
- (15) The Council considers however that practical implementation challenges remain for both private and public organisations, and that the application of specific provisions of the GDPR would still benefit from further clarity and guidance in order to ensure consistency and legal certainty. The evaluation of the Regulation should also duly take into account the burden of certain provisions when applied by smaller entities, such as SMEs and local authorities, as **well as non-profit organisations**, exploring opportunities to further support them in complying with their obligations. It is essential in this respect that **the EDPB or**-national supervisory authorities offer specific guidance towards these audiences groups and that continued efforts be made to ensure that GDPR principles, legal concepts and rights can be effectively interpreted, understood and applied **throughout the Union**.

- (16) Fostering trust in cross-border data flows constitutes a key element in an increasingly digitalised environment and the GDPR has had a positive impact in this perspective. In terms of international data flows, the GDPR has been instrumental in positioning the European Union as an international benchmark and reference standard for data protection and privacy beyond EU borders. The further development of data transfers tools, which can be practically and easily implemented by data controllers is also an important aspect to ensure the protection of personal data transferred to third countries while facilitating international data flows.
- (17) The Council acknowledges the achievement of setting up and operating a new regulatory model thanks to the establishment of the EDPB and increased cooperation among national supervisory authorities. The cooperation and consistency mechanism has had a positive impact in achieving consistent interpretation of the GDPR. Enforcement cooperation has also stepped up and decisions taken vis-a-vis data controllers contribute to reinforcing the accountability of stakeholders and the protection of individuals. The Council calls for continued efforts and initiatives in this direction, including in terms of resources, and to address the remaining challenges.
- (18) Several important legislative instruments applicable to the digital sector have been adopted since the GDPR became effective, and others are currently under discussion to address new practices and new technologies on the EU digital market which have an impact in on personal data processing. The Council considers it crucial to ensure consistency with the GDPR in the implementation of these new instruments with the application of the GDPR and that regulatory cooperation should be promoted to meet this objective.

3. **GDPR PRINCIPLES AND THE PROTECTION OF DATA SUBJECTS' RIGHTS**

- (19) The Council considers that, as a principle-based Regulation, the GDPR has demonstrated its ability to ensure respect for common standards in the processing of personal data across the Union. The combination and flexible application of the GDPR principles of lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality, and accountability, have proven effective in protecting data subjects' rights, and responsive to technological developments and changes. As such, the choice of a regulation based on key principles, dedicated rights for individuals and specific obligations for data controllers and processors with a view to protecting fundamental rights and freedoms remain a relevant regulatory approach, including in a context where the economy and society are increasingly digitalised.
- (20) The Council underlines that the protection of personal data is a vital component of responsible and ethical innovation, and that the GDPR has in this regard contributed to fostering trust-worthy innovation. Being technologically neutral, the GDPR has proven adequate for the challenges posed by the evolution of technologies and their underlying processing of personal data, building trust in new solutions and applications developed in many different sectors and by a wide range of actors. With that in mind, the Council considers that the GDPR and compliance with its principles and provisions shall be promoted as an enabler of accountable, responsible and ethical innovation, increasing the level of trust expected by citizens and consumers, and leveraging the protection of personal data as a competitive asset. **The Council also considers it essential for both the future application of GDPR and the development of the digital economy of the Union that the necessity to support innovation and the development of new technologies is taken into account.**

- (21) The Council also deems it important to note that the GDPR has provided a flexible framework allowing for the processing of personal data in emergency or crisis situations, as illustrated by the different information systems and digital tools established while fighting the COVID-19 pandemic at national and European levels. The Council recognises the role played by data protection authorities in supporting public authorities for the development of compliant solutions to face the COVID-19 crisis, and highlights the importance of swift, reliable and EU-wide consistent guidelines in order to address effectively any future emergency or crisis situation for which the processing of personal data would constitute an essential element.
- (22) The trust-enabling framework established by the GDPR has also translated into a significant increase in the exercise of their rights by data subjects, as illustrated by the number of requests addressed to controllers and complaints received and processed by national supervisory authorities over the past five years. The ability to follow up on these requests and the capacity of national supervisory authorities to address the complaints received is an essential element to ensure the adequate and consistent application of the GDPR and the empowerment of data subject through the exercises of their rights. The Council considers it important to monitor data subjects' ability to exercise their rights effectively, as well as their perceptions of the protection of their personal data under EU law.

4. APPLICATION OF THE GDPR BY PRIVATE ORGANISATIONS

(23) Private organisations processing personal data in the Union have progressively increased their compliance and accountability efforts, thus resulting not only in greater protection of individuals' personal data but also in an improved governance of data within organisations in general. The cooperation and consistency mechanism established by the GDPR, providing for a one-stop-shop mechanism for data controller **and processor** processing personal data in more than one Member States, has furthermore enabled greater legal certainty for companies, as well as a level-playing field and consistent enforcement throughout the Union. In this regard, the Council points out the importance of guidelines developed by national supervisory authorities and the EDPB in order to support and facilitate compliance by private organisations and to ensure consistent interpretation and implementation of the GDPR, and encourages the development of further relevant guidelines in general.

- (24) While acknowledging the positive impact of the GDPR on the level of compliance with data protection rules, the Council stresses however that compliance with this new framework has led to an additional burden on smaller organisations, in particular SMEs, which could benefit from further support in implementing compliance solutions appropriate to the risk of the processing of personal data undertaken. The Council notes positively the dedicated guidance for SMEs adopted by the EDPB and several national supervisory authorities, and encourages the further development of practical implementation tools for such organisations. Information and documentation requirements resulting from the GDPR may present a specific challenge for smaller organisations, in particular with regard to processing operations which involve a low risk to data subjects. This is particularly true for controllers whose core activities do not include the processing of personal data **or whose processing activities can be considered as low risk. In this respect, t**The Council ~~therefore~~ encourage the development of practical tools, such as templates and model information clauses, and invite the EDPB to develop targeted guidelines on the obligation to maintain records of processing activities, in order to facilitate compliance by smaller organisations and take into account the volume of personal data processed by such entities and the risk related to that processing.
- (25) More generally, the Council considers that the development of other compliance tools, such as certification and codes of conducts, has so far been limited, even though they could significantly support and facilitate compliance by organisations, including SMEs. The Council therefore calls for the further development of such tools and invites the European Commission and the EDPB to assess how to further support the swift adoption of code of conducts and certification.

(26) The role of the data protection officers (DPOs) has proved to be essential for organisations to comply with the GDPR and for the monitoring of the processing and safeguards implemented, given the profiles, skills and competences of DPOs ~~should be preserved~~. **However**, the Council recognises the difficulties some sectors encounter in appointing DPOs. The Council considers that efforts in awareness raising and training should be promoted in order to ensure that organisations are able to comply with their obligation related to the tasks and duty of DPOs.

5. **APPLICATION OF THE GDPR BY PUBLIC AUTHORITIES**

(27) The Council notes that the GDPR has also entailed significant efforts and positive developments as to the level of protection of personal data when processed by public authorities, including with the adaptation of national legal frameworks. In order to continue supporting the compliance of personal data processing by public authorities, which sometimes led to complex processes and difficulties in interpretation, **for example while dealing with data exchanges and cooperation between public authorities themselves**, the Council encourages national supervisory authorities and, **where relevant** the EDPB, to take into account the specificity of their activities. The Council highlights the particular burdens and challenges for local authorities, and the difficulties encountered by public authorities in appointing a data protection officer, and encourages the development of practical tools and dedicated guidance by data protection authorities for these two aspects.

- (28) The exercise of the right of access under Article 15 of the GDPR, has led to uncertainties regarding its application by public authorities, especially with regard to its scope of application and its relation to the right to access to documents containing personal data. It has been noted in several Member States that the exercise of the right of access has often been invoked to avoid fees applicable according to national civil or administrative law when exercising the right to access to documents, or where the data subject exercising this right does not intend to ascertain whether or not their personal data have been processed, but rather, to pursue other objectives such as the preparation of actions for damages or access to a document. The Council notes that it has therefore been difficult for public authorities to determine whether and to what extent the GDPR right of access should be applied, and how it interacts with provisions applicable at national level for public access to documents and possible related fees. The Council therefore calls on national supervisory authorities and, **where relevant**, the EDPB to develop dedicated guidance in order to remedy possible uncertainty and clarify the application of Article 15 of the GDPR in such context, also taking into account the latest case-law and the roles of national authorities in guaranteeing the right to access to documents.
- (29) Public authorities have sometimes faced interpretation challenges concerning the legal basis under Article 6 of the GDPR allowing for their processing activities, in particular in situations where such processing may be necessary for compliance with a legal obligation under Union law, when the underlying legal act does not sufficiently determine the provisions applicable to such processing. The Council therefore considers that legislative instruments enacted at Union level, when they constitute Union law providing a legal basis for the processing of personal data under Article 6 of the GDPR, should clearly define the requirements and conditions under which such processing may be undertaken by public authorities. **In addition, Union law should, where applicable, clearly recall the competence of national supervisory authorities over the processing of personal data.**

6. MARGINS FOR NATIONAL LEGISLATION

(30) While underlining the importance of ensuring a level-playing field at Union level, in particular for processing undertaken by private organisations,

The Council considers that the margins left for national legislation to define specific framework for certain type of processing activities, for example when it comes to article 85 and 86 of the GDPR regarding the freedom of expression and information and the right of public access to official documents, remain **beneficial and** relevant notably for public authorities given the specificity of their processing activities. Such margins were intentionally included by the co-legislators when adopting the GDPR and have proved to be an effective approach, thus justifying a certain degree of fragmentation, especially in processing activities where Member States have their own jurisdiction or in areas where national legislation lays down specific conditions for processing of personal data, such as in an employment context.

~~(31) The Council however recalls that legal certainty for individuals and organisations shall be ensured throughout the Union and that unintended consequences and fragmentation impacting the cross-border processing of personal data shall be avoided, in order to ensure a level-playing field at Union level.~~

7. SPECIFIC PROCESSING ACTIVITIES

(31) The last five years of effective application of the GDPR have made it possible to identify specific processing activities or related provisions under the GDPR which may benefit from further clarifications in terms of interpretation and guidance, with a view to ensure an effective and coherent implementation.

- a) Processing of minors' personal data: the Council considers that the effective application of the GDPR, and the inherent specific protection that should be afforded to children, would benefit from further clarification of the related provisions of the text and in particular the scope of application of Article 8 of the GDPR, which concerns conditions applicable to child's consent in relation to information society services. More generally, the Council invites the EDPB to develop dedicated guidance on the processing of minors' personal data in order to support and assist data controllers in their efforts to protect minors.
- b) Processing for research and archiving purposes: the GDPR contains specific references and provisions in relation to the processing of personal data for research and archiving purposes which need to be applied to their full extent in order to take into account the specific needs of the research community and the importance of research for society as whole. **The Council recalls in this context that, in accordance with Recital 33 of the GDPR, it is often not possible to fully identify the purpose of personal data processing for scientific research purposes at the time of data collection and that, therefore, data subjects should be allowed to give their consent to certain areas of scientific research when in keeping with recognised ethical standards for scientific research.** The Council considers that further clarification is needed when it comes to the processing of personal data for both research and archiving purposes, notably with regard to the applicable legal basis and the conditions for consent **as well as determining the roles and responsibilities.** ~~In addition, the~~ ~~The Council therefore~~ invites the EDPB to adopt specific guidelines supporting the development of compliant activities in the areas of scientific research and archiving.

- c) Processing by courts acting in their judicial capacity: while acknowledging the work undertaken by the European Commission within the framework of its expert group on Regulation (EU) 2016/679 and Directive (EU) 2016/680, the Council considers that further consultation ought to be conducted in this area, taking into account case-law developments and the specificities of processing activities, in order to facilitate the consistent interpretation of related provisions.
- d) Anonymisation and pseudonymisation: the Council considers that requirements related to anonymisation and pseudonymisation, given their importance in reducing or mitigating risks associated with the processing of personal data and references to such notions in other pieces of EU law, would benefit from further clarification so that they can be effectively implemented by controllers and processors. The Council therefore invites the EDPB to adopt comprehensive guidelines on anonymisation and pseudonymisation, to ensure consistent interpretation and application at EU level, and notably provide clarifications of the conditions, requirements and legal basis for such processing activities.
- e) Profiling and scoring: the processing of personal data resulting in the profiling and scoring of individuals have become increasingly widespread in many sectors and applications and are integrated in many technological solutions. They may entail significant risks to data subjects rights, including consequences on their particular situation. Such processing activities have been addressed in several legislative instruments recently adopted at EU level. The Council therefore recommends ensuring the effective and consistent application of the GDPR provisions applicable to profiling and scoring, and assessing whether the current ~~application~~ **legal framework and its application** is effective **in protecting data subjects** or requires further guidance and improvement **to clearly limit profiling and scoring activities.**

- f) Information exchange with law enforcement authorities: While recognising the importance of access to information for law enforcement purposes, **and to achieve a balance between the protection of personal data and internal security**, the Council stresses the need to ensure legal certainty and the protection of individuals' rights for both private and public actors whose processing of personal data falls within the scope of the GDPR, **in particular when it comes to the legal basis allowing for such exchange of information**. ~~The~~ conditions under which data controllers whose processing of personal data falls within the scope of the GDPR may disclose such personal data to law enforcement authorities should be ~~clarified~~ **clear** and the full respect to data subject's rights **under the GDPR** and fundamental rights guaranteed.

8. COOPERATION AND CONSISTENCY MECHANISM

- (32) The Council considers that the cooperation and consistency mechanism established by the GDPR has led to sustained and efficient cooperation between national supervisory authorities and that the setting up of the EDPB and its related procedures are to be considered positive achievement, as illustrated by the number of final decisions on cross-border cases adopted over the past five years.
- (33) The Council stresses that the effective enforcement of the GDPR, including vis-a-vis international large-scale data controllers, is an essential element for the effective protection of data subjects' rights. While enforcement challenges have been identified and remain, the Council takes note of the recent Commission proposal laying down additional procedural rules relating to the enforcement of the GDPR, which will be examined under the ordinary legislative procedure.

(34) The development of consistent and EU-wide guidance has also been crucial for the effective implementation of the specific provisions of the GDPR, and the Council considers that national supervisory authorities and the EDPB have played an important role in this regard. In this context, the Council highlights the importance of reviewing existing guidelines, when necessary and in particular in the light of case-law developments, and the need to allow for an effective and comprehensive consultation with all stakeholders prior to the adoption of specific guidelines.

9. INTERNATIONAL TRANSFERS AND THE EXTERNAL DIMENSION OF THE GDPR

(35) When it comes to the transfer of personal data to third countries, the Council highlights that the development of any future data transfer tool must remain sufficiently protective of personal data of individuals in the EU and comply with the requirements as set out by the case law of the CJEU, thus ensuring effective protection for individuals and legal certainty for data controllers.

(36) The Council considers that adequacy decisions adopted pursuant to Article 45 of the GDPR are an essential tool, facilitating and fostering international data flows with trust and making the European data protection model known as a benchmark at global level. In this regard, the Council invites the European Commission to increase the transparency of its assessment process and present a comprehensive and coherent strategy for future adequacy decisions, which should also explore opportunities for and benefits of sectorial or sub-national adequacy decisions. The Council stresses that the ongoing review of previous adequacy decisions adopted by the Commission on the basis of Article 25(6) of Directive 95/46/EC shall be completed as a priority, also in order to inform the development of a future EU adequacy strategy.

- (37) The Council acknowledges the benefits of other transfer tools provided for under the GDPR and considers that EDPB guidelines in this field have proven useful, notably when it comes to standard contractual clauses. The Council notes however that certain transfer tools have not been used to their full extent, due to the lack of initiatives aiming at fostering their development and to the complexity of the process for their adoption. Specific type of transfers, in particular to data controllers or processors which are not established in the EU but whose processing activities fall within the scope of the GDPR, would benefit from dedicated transfer tools, which development should be further explored. Therefore, tThe Council considers that further guidance and support to facilitate the adoption and use of transfer tools, such as code of conducts, certifications and binding corporate rules, shall be encouraged, including by facilitating adoption procedures and a sector-specific approach.
- (38) The Council welcomes the increased cooperation between national supervisory authorities and third countries' authorities as essential in ensuring effective protection of data subjects' rights. The development of networks where such cooperation could be further established and the adoption of dedicated instruments for international cooperation and enforcement could reinforce the comprehensive and consistent application of the GDPR in the globalised digital economy.
- (39) Nevertheless, the Council acknowledges the remaining challenges related to the enforcement of the GDPR towards companies which are not established in the European Union, raising concerns as to the level-playing field with controllers established in the European Union and the effective protection of individuals. The Council invites the EDPB and the European Commission to explore the opportunity to develop dedicated instruments, or to relying on existing ones, in order to facilitate GDPR enforcement in such cases.

10. ARTICULATION BETWEEN THE GDPR AND OTHER EU LEGISLATIVE ACTS, IN PARTICULAR THE NEW REGULATIONS APPLICABLE TO THE DIGITAL SECTOR.

- (40) The Council highlights the that, since 2018, the European Union has adopted new pieces of legislations the implementation of which may interact with the GDPR provisions, in particular when it comes to new legal frameworks applicable to the digital sector. In this context, the Council recalls the need to ensure consistency and prevent the EU legal landscape from fragmentation as regards the protection of personal data. To that end, any new EU legislation containing provisions concerning the processing of personal data should be consistent with the GDPR and the CJEU case law.
- (41) In order to guarantee the continued and effective application of the GDPR, the Council ~~invites~~ **recommends** the EDPB to adopt, when necessary, dedicated opinions and guidelines to clarify how the GDPR provisions are to be applied in the light of new obligations stemming from other pieces of EU law. This remains a highly relevant issue to be addressed, not least when it comes to new EU legislation for the digital sector (the Digital Markets Act (DMA), Digital Services Act (DSA), Data Governance Act (DGA), Data Act, Artificial Intelligence Act (AI Act), etc.), but also when it comes to legislation in other fields such as **open data**, law enforcement, cybersecurity or competition. In this context, the Council considers that cooperation among relevant regulators is of key importance to ensure effective implementation and legal certainty.

11. CONCLUSIONS

- (42) Five years on from the beginning of its effective application, the Council considers that, in general, the GDPR remains an appropriate legal framework for the protection of personal data of individuals in the Union and stresses the importance of continuing to ensure its effective and consistent implementation. In this context, the Council invites the European Commission to pursue an overarching and comprehensive evaluation **with regard to its application and functioning** in its upcoming report.
- (43) The Council stresses that the GDPR has successfully provided an increased level of protection of personal data throughout the Union and that its implementation within organisations created a strengthened data protection culture and a greater consideration for data governance as a whole. Considering positive influence of the GDPR at global level, the Council considers that efforts should be pursued to promote the Regulation as an enabler of accountable, responsible and ethical innovation in the digital economy.
- (44) **The Council considers that the margins left for national legislation to define specific framework for certain type of processing activities remain beneficial, relevant, and have proved to be an effective approach.**
- (45) The Council invites the European Commission to carry out its upcoming evaluation by taking into account the remaining ~~implementation~~ challenges faced by both public and private organisations, highlighting the importance of relevant guidance and practical tools to be developed by **the EDPB and** national supervisory authorities ~~and the EDPB.~~ The Council highlights in particular the need for clarification and further guidance **that is concise, practical and easily understandable,** as mentioned in this position.

- (46) The transfer of personal data to third countries and the international dimension of the GDPR remain of key importance, in particular in the light of the globalisation of the digital economy and technological developments. In this context, the Council invites the European Commission to complete the review of existing adequacy decisions as a priority and to present a comprehensive strategy for the adoption of future adequacy decisions. The further development of other data transfer tools under the GDPR should also be considered as a priority.
- (47) The Council considers that the effective application of the GDPR shall also be evaluated in the context of new technologies and further legislative developments at EU level impacting on the processing of personal data, with a view to ensuring consistency, legal certainty and the effective protection of individuals' fundamental right to the protection of their personal data.
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Council position and findings on the application of the GDPR (*Clean version*)**1. INTRODUCTION**

- (1) The General Data Protection Regulation ('GDPR')³ became applicable on 25 May 2018, repealing and replacing Directive 95/46/EC. It aims to create a strong and more coherent data protection framework in the EU, with a two-fold objective of both protecting fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data, and allowing the free movement of personal data within the Union.
- (2) According to Article 97 of the GDPR, every four years as of May 2020, the Commission shall submit a report on the evaluation and review of the Regulation to the European Parliament and the Council.
- (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
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- (4) The GDPR requires that Commission takes into account the positions and findings of the European Parliament, of the Council, and of other relevant bodies or sources. The Commission may also request information from Member States and supervisory authorities.
- (5) Anticipating the first GDPR evaluation and review by the European Commission in accordance with Article 97, on 15th January 2020, the Council adopted its first *Council position and findings on the application of the General Data Protection Regulation (GDPR)* outlining the issues relating to the application and interpretation of the GDPR that had raised most concerns in Member States at the time, in particular in relation to 1) the challenges of determining or applying appropriate safeguards in the absence of an adequacy decision; 2) the additional work for the supervisory authorities resulting from the cooperation and consistency mechanisms under Chapter VII of the GDPR, as well as the resource implications of those mechanisms; 3) the unforeseen fragmentation of legislation; 4) new obligations for controllers and processors in the private sector introduced by certain provisions of the GDPR; and 5) the steps to be taken by the supervisory authorities to tackle situations where controllers established in third countries fail to designate a representative in the Union.
- (6) While acknowledging the role of the European Data Protection Board ('EDPB') and national supervisory authorities in providing guidance, the Council had furthermore highlighted specific areas to which further attention should be paid, in particular: the application of the GDPR in the field of new technologies as well as the issues related to big tech companies; the practical tools for small and medium-sized enterprises ('SMEs') and charitable or voluntary associations, such as a harmonised form for controllers and processors to notify the supervisory authorities of personal data breach, or a simplified record of processing, as well as other appropriate tools for SMEs to apply the GDPR in view of their specific needs; efficient working arrangements of supervisory authorities in cross-border cases; and issues relating to situations where a representative of a controller or a processor established outside the EU does not comply with its obligations.

- (7) On 24 June 2020, the European Commission adopted the Communication from the Commission to the European Parliament and the Council entitled “Data protection as a pillar of citizens’ empowerment and the EU’s approach to the digital transition - two years of application of the General Data Protection Regulation”, noting in particular that to meet the full potential of the GDPR, it was important to create a harmonised approach and a European common culture of data protection, and to foster a more efficient and harmonised handling of cross-border cases. Based on its evaluation, the Commission listed a series of actions identified as necessary to support the application of the GDPR with a view to implementing and complementing the legal framework, making the new governance system deliver its full potential, supporting stakeholders, encouraging innovation, further developing the toolkit for data transfers, and promoting convergence and developing international cooperation.
- (8) With a view to preparing this second Council position and findings on the application of the GDPR, and in order to feed into the second Commission report due in 2024, the Presidency drew up a text based on comments provided by the Member States after a series of exchange of views at the meetings of the Council Data Protection Working Party on 24 July, 12 September and 11 October 2023. Member States were notably asked to identify areas or sectors where the GDPR could be considered to be effectively implemented, to report on practical implementation at national level, to take stock of the international dimension of the GDPR and to provide their views regarding the application and enforcement of the GDPR vis-à-vis non-EU companies active on the EU market.
- (9) The Council position and findings based on that preparatory work are outlined in this document. In addition to the first implementation report adopted by the Commission in 2020, the Council has also taken note of the Commission’s proposal for a Regulation laying down additional procedural rules relating to the enforcement of the GDPR⁴, presented in July 2023, which is currently also being discussed within the Council Working Party on Data Protection.

⁴ COM/2023/348 final

- (10) The Council highlights the fact that this is the first opportunity to evaluate the GDPR over a substantial period of more than five years since its effective application began, in accordance with its Article 97. This position benefits, in consequence, from a more significant experience by Member States in the application of the GDPR. The practical experience of national supervisory authorities in enforcing and monitoring the application of the GDPR, the adoption of guidance and binding decisions by the EDPB, as well as relevant court rulings - including by the Court of Justice of the European Union (CJEU) - can also be stressed as important elements taken into account. The challenges, concerns and points of attention identified by the Council in 2020, as well as the list of actions laid down by the Commission in its subsequent Communication, have furthermore been considered as references for the development of the current position and findings.
- (11) As it was the case in 2020, the Council's view is that its position and findings should not be limited to the topics specifically mentioned in Article 97(2) of the GDPR. With that in mind, the Council continues to encourage the Commission to take the opportunity of its upcoming report to evaluate and review the application and functioning of the GDPR beyond what is specifically mentioned in that Article. A comprehensive scope of evaluation is even more justified by the fact that, since last report adopted in 2020, the practical experiences and inputs from relevant stakeholders and organisations have further developed, and the regulatory landscape has evolved significantly, with several legislative instruments adopted at EU level impacting on the processing of personal data and interacting with the GDPR.

2. GENERAL REMARKS

- (12) In the view of the Council, the GDPR continues to be a success. The Regulation has led to positive outcomes for the harmonisation of EU law and the strengthening of a data protection culture at EU and global level. Its application has enhanced trust and legal certainty, facilitated cross-border data flows within the EU, thus benefiting the internal market and the development of the digital economy.

- (13) Five years on from the beginning of its effective application, the GDPR continues to represent an important milestone that has strengthened the fundamental rights to respect for private and family life, home and communications privacy, and to the protection of personal data (Articles 7 and 8 of the Charter of Fundamental Rights of the European Union), by providing European citizens with an equal level of protection and allowing them to have more control over the processing of their personal data. Data subjects' rights have been reinforced and the awareness, knowledge and understanding of data protection rights have increased among the general public. The GDPR has had a positive effect on transparency and data subjects' empowerment, as reflected in the increased in the exercise of data subjects' rights, including their new ones.
- (14) The guarantees for the lawfulness of the processing of personal data have also been reinforced in practice and the application of GDPR provisions has played a significant role in increasing the transparency and security of personal data processing. Controllers and processors are more aware of their obligations and of the consequences of processing that is not compliant with the GDPR. The accountability of entities subject to the GDPR has strengthened and compliance efforts have also had a positive impact on data governance within organisations in general.
- (15) The Council considers however that practical implementation challenges remain for both private and public organisations, and that the application of specific provisions of the GDPR would still benefit from further clarity and guidance in order to ensure consistency and legal certainty. The evaluation of the Regulation should also duly take into account the burden of certain provisions when applied by smaller entities, such as SMEs and local authorities, as well as non-profit organisations, exploring opportunities to further support them in complying with their obligations. It is essential in this respect that the EDPB or national supervisory authorities offer specific guidance towards these audiences groups and that continued efforts be made to ensure that GDPR principles, legal concepts and rights can be effectively interpreted, understood and applied throughout the Union.

- (16) Fostering trust in cross-border data flows constitutes a key element in an increasingly digitalised environment and the GDPR has had a positive impact in this perspective. In terms of international data flows, the GDPR has been instrumental in positioning the European Union as an international benchmark and reference standard for data protection and privacy beyond EU borders. The further development of data transfers tools, which can be practically and easily implemented by data controllers is also an important aspect to ensure the protection of personal data transferred to third countries while facilitating international data flows.
- (17) The Council acknowledges the achievement of setting up and operating a new regulatory model thanks to the establishment of the EDPB and increased cooperation among national supervisory authorities. The cooperation and consistency mechanism has had a positive impact in achieving consistent interpretation of the GDPR. Enforcement cooperation has also stepped up and decisions taken vis-a-vis data controllers contribute to reinforcing the accountability of stakeholders and the protection of individuals. The Council calls for continued efforts and initiatives in this direction, including in terms of resources, and to address the remaining challenges.
- (18) Several important legislative instruments applicable to the digital sector have been adopted since the GDPR became effective, and others are currently under discussion to address new practices and new technologies on the EU digital market which have an impact in on personal data processing. The Council considers it crucial to ensure consistency with the GDPR in the implementation of these new instruments with the application of the GDPR and that regulatory cooperation should be promoted to meet this objective.

3. GDPR PRINCIPLES AND THE PROTECTION OF DATA SUBJECTS' RIGHTS

- (19) The Council considers that, as a principle-based Regulation, the GDPR has demonstrated its ability to ensure respect for common standards in the processing of personal data across the Union. The combination and flexible application of the GDPR principles of lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality, and accountability, have proven effective in protecting data subjects' rights, and responsive to technological developments and changes. As such, the choice of a regulation based on key principles, dedicated rights for individuals and specific obligations for data controllers and processors with a view to protecting fundamental rights and freedoms remain a relevant regulatory approach, including in a context where the economy and society are increasingly digitalised.
- (20) The Council underlines that the protection of personal data is a vital component of responsible and ethical innovation, and that the GDPR has in this regard contributed to fostering trust-worthy innovation. Being technologically neutral, the GDPR has proven adequate for the challenges posed by the evolution of technologies and their underlying processing of personal data, building trust in new solutions and applications developed in many different sectors and by a wide range of actors. With that in mind, the Council considers that the GDPR and compliance with its principles and provisions shall be promoted as an enabler of accountable, responsible and ethical innovation, increasing the level of trust expected by citizens and consumers, and leveraging the protection of personal data as a competitive asset. The Council also considers it essential for both the future application of GDPR and the development of the digital economy of the Union that the necessity to support innovation and the development of new technologies is taken into account.

- (21) The Council also deems it important to note that the GDPR has provided a flexible framework allowing for the processing of personal data in emergency or crisis situations, as illustrated by the different information systems and digital tools established while fighting the COVID-19 pandemic at national and European levels. The Council recognises the role played by data protection authorities in supporting public authorities for the development of compliant solutions to face the COVID-19 crisis, and highlights the importance of swift, reliable and EU-wide consistent guidelines in order to address effectively any future emergency or crisis situation for which the processing of personal data would constitute an essential element.
- (22) The trust-enabling framework established by the GDPR has also translated into a significant increase in the exercise of their rights by data subjects, as illustrated by the number of requests addressed to controllers and complaints received and processed by national supervisory authorities over the past five years. The ability to follow up on these requests and the capacity of national supervisory authorities to address the complaints received is an essential element to ensure the adequate and consistent application of the GDPR and the empowerment of data subject through the exercises of their rights. The Council considers it important to monitor data subjects' ability to exercise their rights effectively, as well as their perceptions of the protection of their personal data under EU law.

4. APPLICATION OF THE GDPR BY PRIVATE ORGANISATIONS

(23) Private organisations processing personal data in the Union have progressively increased their compliance and accountability efforts, thus resulting not only in greater protection of individuals' personal data but also in an improved governance of data within organisations in general. The cooperation and consistency mechanism established by the GDPR, providing for a one-stop-shop mechanism for data controller and processor processing personal data in more than one Member States, has furthermore enabled greater legal certainty for companies, as well as a level-playing field and consistent enforcement throughout the Union. In this regard, the Council points out the importance of guidelines developed by national supervisory authorities and the EDPB in order to support and facilitate compliance by private organisations and to ensure consistent interpretation and implementation of the GDPR, and encourages the development of further relevant guidelines in general.

- (24) While acknowledging the positive impact of the GDPR on the level of compliance with data protection rules, the Council stresses however that compliance with this new framework has led to an additional burden on smaller organisations, in particular SMEs, which could benefit from further support in implementing compliance solutions appropriate to the risk of the processing of personal data undertaken. The Council notes positively the dedicated guidance for SMEs adopted by the EDPB and several national supervisory authorities, and encourages the further development of practical implementation tools for such organisations. Information and documentation requirements resulting from the GDPR may present a specific challenge for smaller organisations, in particular with regard to processing operations which involve a low risk to data subjects. This is particularly true for controllers whose core activities do not include the processing of personal data or whose processing activities can be considered as low risk. In this respect, the Council encourage the development of practical tools, such as templates and model information clauses, and invite the EDPB to develop targeted guidelines on the obligation to maintain records of processing activities, in order to facilitate compliance by smaller organisations and take into account the volume of personal data processed by such entities and the risk related to that processing.
- (25) More generally, the Council considers that the development of other compliance tools, such as certification and codes of conducts, has so far been limited, even though they could significantly support and facilitate compliance by organisations, including SMEs. The Council therefore calls for the further development of such tools and invites the European Commission and the EDPB to assess how to further support the swift adoption of code of conducts and certification.

(26) The role of the data protection officers (DPOs) has proved to be essential for organisations to comply with the GDPR and for the monitoring of the processing and safeguards implemented, given the profiles, skills and competences of DPOs. However, the Council recognises the difficulties some sectors encounter in appointing DPOs. The Council considers that efforts in awareness raising and training should be promoted in order to ensure that organisations are able to comply with their obligation related to the tasks and duty of DPOs.

5. APPLICATION OF THE GDPR BY PUBLIC AUTHORITIES

(27) The Council notes that the GDPR has also entailed significant efforts and positive developments as to the level of protection of personal data when processed by public authorities, including with the adaptation of national legal frameworks. In order to continue supporting the compliance of personal data processing by public authorities, which sometimes led to complex processes and difficulties in interpretation, for example while dealing with data exchanges and cooperation between public authorities themselves, the Council encourages national supervisory authorities and, where relevant the EDPB, to take into account the specificity of their activities. The Council highlights the particular burdens and challenges for local authorities, and the difficulties encountered by public authorities in appointing a data protection officer, and encourages the development of practical tools and dedicated guidance by data protection authorities for these two aspects.

- (28) The exercise of the right of access under Article 15 of the GDPR, has led to uncertainties regarding its application by public authorities, especially with regard to its scope of application and its relation to the right to access to documents containing personal data. It has been noted in several Member States that the exercise of the right of access has often been invoked to avoid fees applicable according to national civil or administrative law when exercising the right to access to documents, or where the data subject exercising this right does not intend to ascertain whether or not their personal data have been processed, but rather, to pursue other objectives such as the preparation of actions for damages or access to a document. The Council notes that it has therefore been difficult for public authorities to determine whether and to what extent the GDPR right of access should be applied, and how it interacts with provisions applicable at national level for public access to documents and possible related fees. The Council therefore calls on national supervisory authorities and, where relevant, the EDPB to develop dedicated guidance in order to remedy possible uncertainty and clarify the application of Article 15 of the GDPR in such context, also taking into account the latest case-law and the roles of national authorities in guaranteeing the right to access to documents.
- (29) Public authorities have sometimes faced interpretation challenges concerning the legal basis under Article 6 of the GDPR allowing for their processing activities, in particular in situations where such processing may be necessary for compliance with a legal obligation under Union law, when the underlying legal act does not sufficiently determine the provisions applicable to such processing. The Council therefore considers that legislative instruments enacted at Union level, when they constitute Union law providing a legal basis for the processing of personal data under Article 6 of the GDPR, should clearly define the requirements and conditions under which such processing may be undertaken by public authorities. In addition, Union law should, where applicable, clearly recall the competence of national supervisory authorities over the processing of personal data.

6. MARGINS FOR NATIONAL LEGISLATION

- (30) While underlining the importance of ensuring a level-playing field at Union level, in particular for processing undertaken by private organisations, the Council considers that the margins left for national legislation to define specific framework for certain type of processing activities, for example when it comes to article 85 and 86 of the GDPR regarding the freedom of expression and information and the right of public access to official documents, remain beneficial and relevant notably for public authorities given the specificity of their processing activities. Such margins were intentionally included by the co-legislators when adopting the GDPR and have proved to be an effective approach, thus justifying a certain degree of fragmentation, especially in processing activities where Member States have their own jurisdiction or in areas where national legislation lays down specific conditions for processing of personal data, such as in an employment context.

7. SPECIFIC PROCESSING ACTIVITIES

- (31) The last five years of effective application of the GDPR have made it possible to identify specific processing activities or related provisions under the GDPR which may benefit from further clarifications in terms of interpretation and guidance, with a view to ensure an effective and coherent implementation.

- a) Processing of minors' personal data: the Council considers that the effective application of the GDPR, and the inherent specific protection that should be afforded to children, would benefit from further clarification of the related provisions of the text and in particular the scope of application of Article 8 of the GDPR, which concerns conditions applicable to child's consent in relation to information society services. More generally, the Council invites the EDPB to develop dedicated guidance on the processing of minors' personal data in order to support and assist data controllers in their efforts to protect minors.
- b) Processing for research and archiving purposes: the GDPR contains specific references and provisions in relation to the processing of personal data for research and archiving purposes which need to be applied to their full extent in order to take into account the specific needs of the research community and the importance of research for society as whole. The Council recalls in this context that, in accordance with Recital 33 of the GDPR, it is often not possible to fully identify the purpose of personal data processing for scientific research purposes at the time of data collection and that, therefore, data subjects should be allowed to give their consent to certain areas of scientific research when in keeping with recognised ethical standards for scientific research. The Council considers that further clarification is needed when it comes to the processing of personal data for both research and archiving purposes, notably with regard to the applicable legal basis and the conditions for consent as well as determining the roles and responsibilities. In addition, the Council invites the EDPB to adopt specific guidelines supporting the development of compliant activities in the areas of scientific research and archiving.

- c) Processing by courts acting in their judicial capacity: while acknowledging the work undertaken by the European Commission within the framework of its expert group on Regulation (EU) 2016/679 and Directive (EU) 2016/680, the Council considers that further consultation ought to be conducted in this area, taking into account case-law developments and the specificities of processing activities, in order to facilitate the consistent interpretation of related provisions.
- d) Anonymisation and pseudonymisation: the Council considers that requirements related to anonymisation and pseudonymisation, given their importance in reducing or mitigating risks associated with the processing of personal data and references to such notions in other pieces of EU law, would benefit from further clarification so that they can be effectively implemented by controllers and processors. The Council therefore invites the EDPB to adopt comprehensive guidelines on anonymisation and pseudonymisation, to ensure consistent interpretation and application at EU level, and notably provide clarifications of the conditions, requirements and legal basis for such processing activities.
- e) Profiling and scoring: the processing of personal data resulting in the profiling and scoring of individuals have become increasingly widespread in many sectors and applications and are integrated in many technological solutions. They may entail significant risks to data subjects rights, including consequences on their particular situation. Such processing activities have been addressed in several legislative instruments recently adopted at EU level. The Council therefore recommends ensuring the effective and consistent application of the GDPR provisions applicable to profiling and scoring, and assessing whether the current legal framework and its application is effective in protecting data subjects or requires further guidance and improvement to clearly limit profiling and scoring activities.

- f) Information exchange with law enforcement authorities: While recognising the importance of access to information for law enforcement purposes, and to achieve a balance between the protection of personal data and internal security, the Council stresses the need to ensure legal certainty and the protection of individuals' rights for both private and public actors whose processing of personal data falls within the scope of the GDPR, in particular when it comes to the legal basis allowing for such exchange of information. The conditions under which data controllers whose processing of personal data falls within the scope of the GDPR may disclose such personal data to law enforcement authorities should be clear and the full respect to data subject's rights under the GDPR and fundamental rights guaranteed.

8. COOPERATION AND CONSISTENCY MECHANISM

- (32) The Council considers that the cooperation and consistency mechanism established by the GDPR has led to sustained and efficient cooperation between national supervisory authorities and that the setting up of the EDPB and its related procedures are to be considered positive achievement, as illustrated by the number of final decisions on cross-border cases adopted over the past five years.
- (33) The Council stresses that the effective enforcement of the GDPR, including vis-a-vis international large-scale data controllers, is an essential element for the effective protection of data subjects' rights. While enforcement challenges have been identified and remain, the Council takes note of the recent Commission proposal laying down additional procedural rules relating to the enforcement of the GDPR, which will be examined under the ordinary legislative procedure.

(34) The development of consistent and EU-wide guidance has also been crucial for the effective implementation of the specific provisions of the GDPR, and the Council considers that national supervisory authorities and the EDPB have played an important role in this regard. In this context, the Council highlights the importance of reviewing existing guidelines, when necessary and in particular in the light of case-law developments, and the need to allow for an effective and comprehensive consultation with all stakeholders prior to the adoption of specific guidelines.

9. INTERNATIONAL TRANSFERS AND THE EXTERNAL DIMENSION OF THE GDPR

(35) When it comes to the transfer of personal data to third countries, the Council highlights that the development of any future data transfer tool must remain sufficiently protective of personal data of individuals in the EU and comply with the requirements as set out by the case law of the CJEU, thus ensuring effective protection for individuals and legal certainty for data controllers.

(36) The Council considers that adequacy decisions adopted pursuant to Article 45 of the GDPR are an essential tool, facilitating and fostering international data flows with trust and making the European data protection model known as a benchmark at global level. In this regard, the Council invites the European Commission to increase the transparency of its assessment process and present a comprehensive and coherent strategy for future adequacy decisions, which should also explore opportunities for and benefits of sectorial or sub-national adequacy decisions. The Council stresses that the ongoing review of previous adequacy decisions adopted by the Commission on the basis of Article 25(6) of Directive 95/46/EC shall be completed as a priority, also in order to inform the development of a future EU adequacy strategy.

- (37) The Council acknowledges the benefits of other transfer tools provided for under the GDPR and considers that EDPB guidelines in this field have proven useful, notably when it comes to standard contractual clauses. The Council notes however that certain transfer tools have not been used to their full extent, due to the lack of initiatives aiming at fostering their development and to the complexity of the process for their adoption. Specific type of transfers, in particular to data controllers or processors which are not established in the EU but whose processing activities fall within the scope of the GDPR, would benefit from dedicated transfer tools, which development should be further explored. Therefore, the Council considers that further guidance and support to facilitate the adoption and use of transfer tools, such as code of conducts, certifications and binding corporate rules, shall be encouraged, including by facilitating adoption procedures and a sector-specific approach.
- (38) The Council welcomes the increased cooperation between national supervisory authorities and third countries' authorities as essential in ensuring effective protection of data subjects' rights. The development of networks where such cooperation could be further established and the adoption of dedicated instruments for international cooperation and enforcement could reinforce the comprehensive and consistent application of the GDPR in the globalised digital economy.
- (39) Nevertheless, the Council acknowledges the remaining challenges related to the enforcement of the GDPR towards companies which are not established in the European Union, raising concerns as to the level-playing field with controllers established in the European Union and the effective protection of individuals. The Council invites the EDPB and the European Commission to explore the opportunity to develop dedicated instruments, or to relying on existing ones, in order to facilitate GDPR enforcement in such cases.

10. ARTICULATION BETWEEN THE GDPR AND OTHER EU LEGISLATIVE ACTS, IN PARTICULAR THE NEW REGULATIONS APPLICABLE TO THE DIGITAL SECTOR.

- (40) The Council highlights the that, since 2018, the European Union has adopted new pieces of legislations the implementation of which may interact with the GDPR provisions, in particular when it comes to new legal frameworks applicable to the digital sector. In this context, the Council recalls the need to ensure consistency and prevent the EU legal landscape from fragmentation as regards the protection of personal data. To that end, any new EU legislation containing provisions concerning the processing of personal data should be consistent with the GDPR and the CJEU case law.
- (41) In order to guarantee the continued and effective application of the GDPR, the Council recommends the EDPB to adopt, when necessary, dedicated opinions and guidelines to clarify how the GDPR provisions are to be applied in the light of new obligations stemming from other pieces of EU law. This remains a highly relevant issue to be addressed, not least when it comes to new EU legislation for the digital sector (the Digital Markets Act (DMA), Digital Services Act (DSA), Data Governance Act (DGA), Data Act, Artificial Intelligence Act (AI Act), etc.), but also when it comes to legislation in other fields such as open data, law enforcement, cybersecurity or competition. In this context, the Council considers that cooperation among relevant regulators is of key importance to ensure effective implementation and legal certainty.

11. CONCLUSIONS

- (42) Five years on from the beginning of its effective application, the Council considers that, in general, the GDPR remains an appropriate legal framework for the protection of personal data of individuals in the Union and stresses the importance of continuing to ensure its effective and consistent implementation. In this context, the Council invites the European Commission to pursue an overarching and comprehensive evaluation with regard to its application and functioning in its upcoming report.
- (43) The Council stresses that the GDPR has successfully provided an increased level of protection of personal data throughout the Union and that its implementation within organisations created a strengthened data protection culture and a greater consideration for data governance as a whole. Considering positive influence of the GDPR at global level, the Council considers that efforts should be pursued to promote the Regulation as an enabler of accountable, responsible and ethical innovation in the digital economy.
- (44) The Council considers that the margins left for national legislation to define specific framework for certain type of processing activities remain beneficial, relevant, and have proved to be an effective approach.
- (45) The Council invites the European Commission to carry out its upcoming evaluation by taking into account the remaining challenges faced by both public and private organisations, highlighting the importance of relevant guidance and practical tools to be developed by the EDPB and national supervisory authorities. The Council highlights in particular the need for clarification and further guidance that is concise, practical and easily understandable, as mentioned in this position.

- (46) The transfer of personal data to third countries and the international dimension of the GDPR remain of key importance, in particular in the light of the globalisation of the digital economy and technological developments. In this context, the Council invites the European Commission to complete the review of existing adequacy decisions as a priority and to present a comprehensive strategy for the adoption of future adequacy decisions. The further development of other data transfer tools under the GDPR should also be considered as a priority.
- (47) The Council considers that the effective application of the GDPR shall also be evaluated in the context of new technologies and further legislative developments at EU level impacting on the processing of personal data, with a view to ensuring consistency, legal certainty and the effective protection of individuals' fundamental right to the protection of their personal data.
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