



Brussels, 25 November 2015
(OR. en)

14461/15

LIMITE

DATAPROTECT 213
JAI 912
MI 746
DIGIT 98
DAPIX 221
FREMP 274
COMIX 619
CODEC 1563

Interinstitutional File:
2012/0011 (COD)

NOTE

From: Presidency
To: Delegations

Subject: Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)
- Written debriefing of trilogue on 24 November

1. On 19th November 2015, the Presidency submitted for examination with a view to confirmation to the Permanent Representatives Committee (COREPER) compromise suggestions on the main outstanding issues relating to Chapters II, III, IV and V of the draft General Data Protection Regulation.
2. On 24th November, the representatives of the Council, the European Parliament and the Commission discussed in a trilogue on the General Data Protection Regulation the provisions related to the main issues relating to Chapters II, III, IV and V. The Presidency's interventions were based on the Council's General Approach and the discussions that took place in the COREPER meeting of 19th November 2015, as well as preceding meetings at expert and JHA Counsellors' level.

3. The intention of the Presidency is to make a technical follow up of the meetings of the Permanent Representatives Committee held on 19th and 26th November in order to find compromise solutions in particular on the issues mentioned below. Taking into account the time constraints and the Presidency's wish to be as complete as possible and allowing delegations sufficient time to analyse the different provisions, the present cover note will be completed in due time to take into account the latest discussions at COREPER level.

Chapter II

4. Concerning Article 6(3a) on the compatibility test and Article 6(4) on further processing for purposes that are incompatible with the purpose for which personal data were initially collected, the European Parliament could accept the approach to include, in the chapeau of Article 6(3a), a reference to the objectives referred to in points (aa) to (g) of Article 21(1) on two conditions:
- Including, in Article 6(3a(e)) the following addition: “the existence of appropriate safeguards, which may include encryption or pseudonymisation”
 - Including, in Recital (38), a more explicit reference to the “*reasonable expectations of the data subject based on his/her relationship with the controller*”.
- Delegations are invited to comment on these suggestions.

5. Concerning Article 7(4) relating to the nature of consent, the Presidency invites delegations to comment on, and where necessary, improve the wording proposed by the Presidency. The Presidency proposed the following wording to COREPER:

“When assessing whether consent is freely given, account shall be taken of the fact whether, among others, the performance of a contract, including the provision of a service, is made conditional on the consent to the processing of data that is not necessary for the performance of this contract, where processing is based on Article 6(1)(b).”

Considering that some Member States raised concerns relating to the wording of this provision, and while on the other hand the European Parliament insists on a strengthening of the wording, the Presidency invites delegations to indicate avenues to redraft this paragraph, possibly by deleting the final part of the sentence relating to “*where processing is based on Article 6(1)(b)*”.

6. Concerning Article 9 relating to the processing of special categories of data, the European Parliament insists to include a reference to biometric data in the list of sensitive data in Article 9(1). The modernised Convention 108 of the Council of Europe foresees to restrictively define biometric data that “*uniquely identify a person*” to qualify as sensitive data. Such a reference would ensure that biometric data are considered as sensitive only in those situations where they would uniquely identify a person or are used to verify his or her identity. The Presidency invites delegations to indicate their flexibility on a possible inclusion of “*biometric data uniquely identifying a person*” in the list of sensitive data, keeping in mind the specific definition of “*biometric data*” in Article 4(11).
7. As regards Article 9(5), the European Parliament could accept this paragraph on the condition to modify the wording as follows: “*Member States may maintain or introduce further conditions with regard to the processing of genetic data or health data*”. Delegations are invited to confirm such redrafting.

Chapter III

8. As regards the information to be provided to the data subject in Article 14 and Article 14a, the European Parliament remains skeptical when it comes to the two-step approach. For the European Parliament, all information listed would have to be provided in all cases, “*if applicable*”.

In line with the updated mandated the Presidency received from COREPER, the co-legislators tentatively agreed on a reformulation of the chapeau of the second step (Article 14(1a) and Article 14a(2)) as follows: “*In addition to the information referred to in paragraph 1, the controller shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing.*”

The reference “*having regard to the specific circumstances and context in which the personal data are processed*” would be included in recital (48). Equally, in consequence to the updated mandate from COREPER, the following information is moved to Articles 14(1) and 14a(1) respectively: information about, “*where applicable, the recipients or categories of recipients of the personal data*” and information about, “*where applicable, that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in case of transfers referred to in Article 42 or 43, or point (h) of Article 44(1), reference to the appropriate or suitable safeguards and the means to obtain a copy of them or where they have been made available.*”

While the European Parliament could accept this suggestion, it insists on moving one additional element to the first step of information to be provided: “*where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party*”. Given that this information is already foreseen to be provided explicitly to the data subject in recital (38) of the Council’s General Approach, the Presidency invites delegations to indicate their flexibility on these points.

9. As regards Article 18 and the right to data portability, the European Parliament insists on a provision concerning the direct transmission from controller to controller, at the request of the data subject, while accepting to provide a significant carve-out, “*where technically feasible and available*”. The Presidency invites comments from delegations on a reworded provision, which may read “*In exercising his or her right to data portability pursuant to paragraph 1, the data subject has the right to obtain that the data is transmitted directly from controller to controller where technically feasible and available, or unless this would involve disproportionate efforts for the controllers*”.

10. Concerning both Articles 19 and 20, the Presidency understands that an explicit reference to a right to object to profiling could be acceptable for Member States in Article 19(1) if profiling is based on Article 6(1(e)) relating to the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or on Article 6(1(f)) relating to the legitimate interest of a controller. The European Parliament could accept this compromise solution and also accept the reference to “*on grounds relating to his/her particular situation*” in Article 19(1), if, in addition, it is provided in Article 19(2) that when objecting to direct marketing, this also covers the objection to the profiling used in the context of direct marketing. The Presidency suggests to clarify this point as follows: “*Where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to the processing of personal data concerning him or her for such marketing, which includes profiling to the extent that it is related to such direct marketing*” Furthermore, the European Parliament insists on the fact that information about the right to object should be explicitly brought to the attention of the data subject and shall be presented clearly and separately from any other information, for both Article 19(1) and (2). Delegations are invited to indicate their flexibility on these points.

In return, the Council’s General Approach would be maintained for Article 20 with the precision that decisions “*based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.*”

Chapter IV

11. Concerning Article 25, the co-legislators tentatively agreed on the following exception to the obligation to appoint a representative: “*(b) processing which is occasional, does not include processing, on a large scale, of special categories of data as referred to in Article 9(1) or processing of data relating to criminal convictions and offences referred to in Article 9a, and is unlikely to result in a risk for the rights and freedoms of individuals, taking into account the nature, context, scope and purposes of the processing*”.

12. As regards the thresholds laid down in Articles 31 and 32 on personal data breaches, the Presidency understands that the Member States showed flexibility to have a gradual approach. The European Parliament considers that the proposed compromise solution, as indicated in document 14076/15, represents a significant move towards the Council by choosing the reference to “risk” for Article 31 and “high” risk for Article 32, as it is the case in the General Approach. Taking into account the original positions of both co-legislators, the Presidency considers the compromise proposed is fair, balanced and would allow the supervisory authorities to fulfill their tasks without overburdening controllers. Delegations are invited to indicate any concrete alternative proposals that would allow to have such a gradual approach and permit reaching a compromise with the European Parliament.
13. As regards Article 32(1(d)) and the reference to the fact that no notification would be required if it would adversely affect a substantial public interest, the Presidency bracketed it at the request of delegations awaiting a stable wording on Article 21. Delegations will note that the European Parliament is largely able to accept the Council’s General Approach’s text on Article 21. In those circumstances, delegations are invited to indicate their flexibility on the deletion of the Article 32(1(d)).
14. As regards Article 35 and the mandatory appointment of a Data Protection Officer, the Presidency signaled to the European Parliament that there was no flexibility from Member States. The European Parliament indicated that the situations proposed in which a Data Protection Officer would be mandatory are strictly limited: public authorities, controllers whose core activities consist of processing operations which require regular and systematic monitoring of the data subjects, and controllers whose core activities consist of processing sensitive data on a large scale. In addition, the European Parliament showed flexibility on further modalities for the mandatory appointment of a Data Protection Officer, for instance relating to a transition period or providing additional incentives elsewhere in the Regulation. The Presidency invites delegations to reflect on such elements, as well as on possible adjustments to the tasks of a Data Protection Officer defined in Article 37.

15. As regards Article 38, the co-legislators tentatively agreed on maintaining the Council’s General Approach while adding a reference to the need for the Commission to declare codes of conduct as “generally valid” in Article 38(1ab). As regards Article 39a(1), the European Parliament could accept an information of the supervisory authority of the certification issued or renewed by the certification body if, in Article 53, an explicit power is included that allows a supervisory authority to reject or declare invalid such a certification.

Chapter V

16. Concerning the requests by the European Parliament to complete Chapter V to take into account the judgment of the Court of Justice of the European Union on case C-362/14 (“Schrems case”) of 6 October 2015, and following the mandate given by COREPER to the Presidency, the co-legislators discussed the following elements:
- A general clause at the end of Article 40 formulated as follows: *“All provisions in this Chapter shall be applied in order to ensure that the level of protection of individuals guaranteed by this Regulation shall not be undermined”*;
 - The reintroduction, in Article 41(2(a)), of the terms *“including concerning public security, defence, national security and criminal law”* given that this reference is already included in recital (81) of the Council’s General Approach. The Commission proposed the inclusion of the following additional wording in Article 41(2(a)): *“including the ones applicable to the access by public authorities for national security, law enforcement and other public interests to the data and to its subsequent use”*. The Presidency proposes the following wording: *“including concerning public security, defense, national security and criminal law and the access of public authorities to personal data”*;
 - A reconfirmation of enforceable data subject rights and effective legal remedies for data subjects in Article 42(1), which is already included in recital (83) of the Council’s General Approach;
 - A clarification, in recital (81), that “adequate” means “essentially equivalent”.

Other issues

17. Delegations are invited to raise any other issue of crucial importance, including on recitals not mentioned in this cover note.
-