



Council of the
European Union

Brussels, 28 October 2014
(OR. en)

14797/14

LIMITE

DATAPROTECT 155

JAI 818

MI 819

DRS 142

DAPIX 157

FREMP 188

COMIX 582

CODEC 2116

Interinstitutional File:
2012/0011 (COD)

NOTE

From: Danish delegation
To: Working Party on Information Exchange and Data Protection
Subject: Danish proposal for amendments to the General Data Protection
Regulation (GDPR)

1. Please find below Danish proposals for amendments to the GDPR. New text is in **bold** and text to be deleted is ~~erased~~. The proposals are made on the basis of the text in document 14270/14.
2. In Denmark employment issues are primarily regulated in agreements between employer organisations and employee organisations (collective agreements). The conditions and circumstances for processing of personal data in this context will therefore often not be laid down as a legal obligation in an act adopted by the parliament. To ensure clarity in the text and that there should not be any doubt that the legal obligation to process personal data could be laid down in collective agreements, Denmark puts forward the following addition to recital 31.

31) In order for processing to be lawful, personal data should be processed on the basis of the consent of the person concerned or some other legitimate legal basis laid down by law, either in this Regulation or in other Union or Member State law as referred to in this Regulation, including the necessity for compliance with a legal obligation to which the controller is subject or the necessity for the performance of a contract to which the data subject is party or in the order to take steps at the request of the data subject prior to entering into a contract. ~~Whereas a~~ **The legal basis obligation** does not necessarily require a legislative act adopted by parliament. **It should however** be clear and precise and its application foreseeable for those subject to it as required by the case law of the Court of Justice of the European Union. **The legal obligation can inter alia be laid down in collective agreements in accordance with Member State labour systems.**

It is also important that it is clear in Article 82 that the reference to Member State law includes collective agreements. Denmark therefore puts forward the following proposal:

1. Member States may adopt by law, **including by collective agreements**, specific rules on the processing of employees' personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective ~~labour~~ agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

3. The use of consent as a legitimate legal basis for the processing of personal data is important in both the private and public sector, e.g. when applying for a job or in order for public authorities to establish the facts of a case prior to making a decision. Therefore the use of consent should not be unnecessarily restrictive. On this basis Denmark has the following amendments to recital 32, 34 and a proposal for a new recital 34a.

32) Where processing is based on the data subject's consent, the controller should be able to demonstrate that the data subject has given the consent to the processing operation. In particular in the context of a written declaration on another matter, safeguards should ensure that the data subject is aware that, and the extent to which, consent is given.

For consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended. ~~consent should not be regarded as freely given if the data subject has no genuine and free choice and is unable to refuse or withdraw consent without detriment.~~

34) In order to safeguard that consent has been freely-given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller and this imbalance makes it unlikely that consent was given freely in all the circumstances of that specific situation.

34a) The relationship between public authorities and data subjects and between employers and employees should not as such constitute a clear imbalance making it unlikely that consent was given freely.

4. Flexibility for Member State legislation is of the utmost importance for Denmark and Denmark has previously made written comments on this issue. In order to make the text even clearer Denmark has the following amendment to recital 35a:

35a) This Regulation provides for general rules on data protection. However in specific cases Member States are also empowered to lay down national rules on data protection. The Regulation does therefore not exclude Member State law that defines the circumstances of specific processing situations, including determining more precisely **when and under which** ~~the conditions under which~~ processing of personal data is lawful. National law may also provide for special processing conditions for specific sectors and for the processing of special categories of data.

5. As it has been pointed out by the Danish delegation several times in the course of the negotiations a requirement of consent from the data subject when processing personal data for scientific (and historical or statistical) purposes will render it virtually impossible to utilize existing population-based registries or large population-based cohorts for research, since it is not feasible to obtain informed consent from each individual for every study utilizing public registries or large cohorts containing information on tens of thousands to millions of individuals. Danish law provides – in accordance with Directive 95/46 – an independent legal basis for processing of personal data historical, statistical or scientific purposes. There is no requirement of consent when processing data for these purposes. However there are appropriate safeguards and conditions in place in Danish law to ensure the rights and freedoms of data subjects when their personal data is being processed for these purposes.

It is very important for Denmark that it is clear in the GDPR that processing of personal data for scientific historical or statistical purposes could continue without the consent of the data subject.

Denmark therefore retains the position that Article 6 (2) should be reinstated as it should be clear that processing of personal data for historical, statistical or scientific purposes is a separate legal basis. The wording of Article 6 (2) below is based on the presumption that option 1 (on p. 49-50) regarding Article 5 and Article 83 in document 14270/14 will be the compromise as it was supported by a majority of delegations.

2. Processing of personal data which is necessary for historical, statistical or scientific purposes or for archiving purposes shall be lawful subject to appropriate conditions and safeguards set out in Member State or Union law.

In addition to this Denmark puts forward the following amendments to recital 125 and proposes a new recital 125aa:

125) The processing of personal data for historical, statistical or scientific purposes and for archiving purposes should in addition to the general principles and specific rules of this Regulation, in particular as regards the conditions for lawful processing, also comply with/respect other relevant legislation such as on clinical trials. The processing of personal data for historical, statistical or scientific purposes and for archiving purposes should not be considered incompatible with the purposes for which the data are initially collected and may be processed for those purposes for a longer period than necessary for that initial purpose. Member States should be authorized to provide, under specific conditions and in the presence of appropriate safeguards for data subjects, specifications and derogations to the information requirements and the rights to access, rectification, erasure, restriction of processing ~~and~~, on the right to data portability **and the right to object when processing personal data for historical, statistical or scientific purposes and for archiving purposes**. The conditions and safeguards in question may entail specific procedures for data subjects to exercise those rights if this is appropriate in the light of the purposes sought by the specific processing along with technical and organisational measures aimed at minimising the processing of personal data in pursuance of the proportionality and necessity principles.

125aa) By coupling information from registries, researchers can obtain new knowledge of great value when it comes to e.g. widespread diseases as cardiovascular disease, cancer, depression etc. On the basis of registries, research results will be much more valid, as they draw on a larger population, whereas research results obtained with other means lack the same solidity.

Within social science, research on the basis of registries enables researchers to obtain essential knowledge about long-term impact of a number of social conditions e.g. unemployment, education, and the coupling of this information to other life conditions. Research results obtained on the basis of registries provide solid, high quality knowledge, which can provide the basis for the formulation and implementation of knowledge-based policy, improve the quality of life for a number of people, and improve the efficiency of social services etc.

Therefore as an independent legitimate legal basis and in order to facilitate scientific research, personal data can be processed for scientific purposes subject to appropriate conditions and safeguards set out in Member State or Union law. Hence consent from the data subject should not be necessary in each case.

As for processing of personal data for archiving purposes Denmark is not satisfied that Article 83 – and in particular paragraph 2 – has found the right balance. Denmark finds that it is necessary to ensure that personal data collected e.g. on the basis of national rules of legal deposit and archiving can still be processed and made available to the public. This is an important part of our democratic system in order to support the rights of expression.

Article 83 (2) should therefore not apply to processing of personal data for archiving purposes.

In any case Article 83 (2) should be worded as follows:

2. The appropriate safeguards referred to in paragraph 1 **are subject to Union or Member State law and could** be such as to ensure, **inter alia**, that
 - a) technological and/or organisational protection measures are applied to the personal data, in particular to make the data unintelligible to any person who is not authorised to access it, unless those measures prevent achieving the purpose of the processing and such purpose cannot be otherwise fulfilled **within reasonable means**; and
 - b) publication or public disclosure by the controller of personal data processed for the abovementioned purposes is only permitted if it does not substantially affect the rights or freedoms of the data subject, except where the data were made manifestly public by the data subject, the data subject has given his or her consent to such publication or public disclosure, or the publication of such personal data is necessary to achieve the purposes of the processing.

6. Denmark agrees that processing of personal data relating to criminal convictions and offences or related security measures should be subject to strict conditions. However processing should be possible both in the private and in the public sector if the data subject has given its explicit consent and Member State or Union law provides for adequate safeguards. Therefore Denmark puts forward the following addition to Article 9 (2a).

2a. Processing of **personal** data relating to criminal convictions and offences or related security measures may only be carried out either **if the data subject has given its explicit consent or if the processing is necessary for the purposes of the legitimate interests pursued by the controller or by a controller to which the data are disclosed except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject** or under the control of official authority or when the processing is necessary for compliance with an obligation to which a controller is subject or for the performance of a task carried out for important reasons of public interest and in so far as authorized by Union law or Member State law providing for adequate safeguards for the rights and freedoms of data subjects. A complete register of criminal convictions may be kept only under the control of official authority.
