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'A' ITEM NOTE

From:	General Secretariat of the Council
To:	Council
No. prev. doc.:	14994/1/19 REV 1
Subject:	Council position and findings on the application of the General Data Protection Regulation (GDPR) - Adoption

1. The General Data Protection Regulation (GDPR) replaced Directive 95/45/EC. It has a two-fold aim, namely to enhance data protection rights of individuals and to improve business opportunities by facilitating the free flow of personal data in the digital single market.

2. The GDPR entered into force in May 2016 and applies from 25 May 2018.

3. According to Article 97 of the GDPR, the Commission shall submit a report on the evaluation and review of the GDPR to the European Parliament and the Council. The first report is due by 25 May 2020. For that purpose, the Commission shall take into account the positions and findings of the European Parliament and the Council, and of other relevant bodies and sources. The Commission may also request information from Member States and supervisory authorities.

In the context of this evaluation and review, the Commission shall examine, in particular, the application and functioning of:

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

4. With a view to preparing the Council position the Presidency drew up a text on the basis of comments provided by the Member States. The Council Working Party on Information Exchange and Data Protection (DAPIX) met on 3 September, 21 October, 11 November and 5 December 2019 to discuss the Council position.

5. Following a silence procedure launched on 6 December 2019, delegations could agree to the text of the Council position as set out in Annex to this note.

6. The Permanent Representatives Committee is accordingly invited to recommend that the Council adopts its position and findings on the application of the General Data Protection Regulation as set out in Annex as an 'A' item of the agenda of one of its forthcoming sessions, with the UK abstaining. The Commission will be informed of the Council position.

1. Introduction

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

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

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

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

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

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

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

(6) The Council takes the view that its positions and findings should not be limited to the topics specifically mentioned in Article 97(2) of the GDPR. Therefore, the Council also encourages the Commission to evaluate and review in its upcoming report the application and functioning of the GDPR beyond what is specifically mentioned in that article. Furthermore, the Commission should take into account the experiences and input of relevant stakeholders. This will help to ensure that the evaluation is as comprehensive as possible. Given the importance and impact of the GDPR in an ever-developing digital society, there are strong arguments supporting a broader review and ongoing discussion on the topic.

(7) At the same time, the Council highlights that the GDPR has only been applied since May 2018. Therefore, it is likely that most of the issues identified by Member States will benefit from more experience in the application of the GDPR in the coming years. Further guidance, especially by the European Data Protection Board (EDPB) and a possibility to exchange information on national practices, interpretations and court decisions would also be useful for Member States.

² 12756/19 REV 1

³ 11535/19

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

2. General remarks

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

(10) The Council acknowledges the important role of national supervisory authorities in the functioning and consistent application of the GDPR. The Council also notes the significant increase in the activities of the supervisory authorities, linked to the exercise of their new tasks and powers, and the positive developments as regards the significantly increased allocation of resources to them in many Member States. The Council shares the view of the Commission on the importance of cooperation among the supervisory authorities of the Member States, particularly within the EDPB. This cooperation should be further strengthened as it is particularly relevant for the supervision of cross-border processing involving risks or for the processing concerning many Member States, for instance as regards so-called big tech companies.

(11) The Council also supports the idea presented by the Commission in its Communication that competition, consumer, and data protection authorities should cooperate when appropriate, for instance, as regards supervising big tech companies. The Council notes that the extensive influence of those companies and their business models have raised some concerns. It would be worth examining and monitoring, for instance, how data subjects can sufficiently exercise their rights against big tech companies. Coordinated efforts to examine the scope of the challenges as well as to create a vision of how to tackle them are therefore needed at the EU level.

(12) Furthermore, the Council deems that controllers and processors need more clarification and guidance from the supervisory authorities and the EDPB. The Commission's upcoming evaluation report should also highlight the broad need for practical guidelines and other suitable means to meet this need.

(13) Drafting sector-specific codes of conduct in accordance with Article 40 of the GDPR could be a suitable way to contribute to the proper application of the GDPR. Such codes of conduct could pay particular attention to issues such as the protection of children's personal data or the processing of health data. A list of codes of conduct, which is being agreed with the supervisory authorities, could help improve coordination and support for such projects. Measures to encourage the drafting of such codes of conduct should be increased and further developed.

(14) At the same time, the Council notes that new phenomena, particularly emerging technologies, also provide new challenges for the protection of personal data as well as for the protection of other fundamental rights such as the prohibition of discrimination. Those challenges relate to topics such as the use of big data, artificial intelligence and algorithms, as well as the internet of things and block-chain technology. The same applies for the use of technologies such as facial recognition, new types of profiling, and the ‘deep fake’ technology. The development of quantum computing can also pose a challenge to the protection of personal data. On the other hand, the Council notes that certain applications of those technologies can also be a great advantage and potentially enhance the privacy of European citizens. In order to keep up with emerging technologies, the Council deems it necessary to monitor and assess the relationship between technological development and the GDPR at EU level on a continuing basis.

(15) The Council underlines that the GDPR was drafted to be technologically neutral and that its provisions already address these new challenges. The Council finds it essential to consider that the GDPR, and more generally the EU’s legal framework for the protection of personal data, is a prerequisite for the development of future digital policy initiatives. However, in light of the above, the Council deems that it is necessary to clarify as soon as possible how the GDPR applies to the aforementioned new technologies.

3. International transfers

(16) In its Communication, the Commission notes the positive trend of data protection rules developing at a global level. There is an increasing number of parties to Council of Europe Convention 108, which has recently been revised. At the same time, countries across the world are adopting new data protection legislation or modernising their regulatory frameworks on data protection.

(17) The Council finds that adequacy decisions are an essential tool for controllers to transfer personal data safely to third countries and international organisations. In this respect, the Council also considers it crucial that the adequacy decisions are based on compliance with all the criteria set for such decisions, including for onward transfers. Adequacy decisions must also be subject to ongoing monitoring and periodic review, as required by Union law, which is essential to ensure effective protection of the rights of the data subject. The Council supports the Commission's intention, expressed in its Communication, to further intensify its dialogue on adequacy with qualifying key partners. The Council encourages the Commission to look into the possibility, when adopting new adequacy decisions, of specifically addressing transfers to and between public authorities. The Council also welcomes the Commission's plan to report in 2020 on the review of the 11 adequacy decisions adopted under Directive 95/46/EC.

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

(19) The Council further notes that the standard contractual clauses for data transfers to third countries developed under Directive 95/46/EC have not been updated in light of developments since they were originally adopted, including the entry into force of the GDPR. The Commission is encouraged to review and revise them in the near future to take into account the needs of controllers and processors.

(20) Member States have noted that the application of some of the aforementioned tools would benefit from further clarification and guidance. For example, some Member States have pointed out that, in the absence of an adequacy decision, the controller may find it difficult to determine what may be considered appropriate safeguards of data protection as referred to in Article 46 of the GDPR. In the Council's view, clarification and guidance would be welcome, particularly from the EDPB. The Council notes the guidance already issued by the EDPB on binding corporate rules. Moreover, it would be necessary to clarify the minimum standards for transfers subject to appropriate safeguards between public authorities. This is important as the public authorities of the Member States constantly need to cooperate and exchange personal data with the authorities of third countries whose legal frameworks differ from that of the EU.

4. Cooperation and consistency mechanisms

(21) The cooperation and consistency mechanisms are, in the Council's view, key instruments to ensure a high and consistent level of protection of personal data throughout the EU. It is expected that the application of those mechanisms will result in a number of important common decisions and guidance documents at the European level in the near future, thereby contributing to a clearer understanding and consistent application of the GDPR as well as reducing discrepancies in its application.

(22) However, while the cooperation and consistency mechanisms are considered key elements of the new regulatory framework, and the supervisory authorities are required to cooperate, Member States have mentioned that their supervisory authorities have faced some challenges in using them. Furthermore, attention has been drawn by some Member States to the administrative burden and human resources implications of the new mechanisms, particularly the implications of the deadlines under Article 60 of the GDPR. Some Member States have also mentioned challenges relating to the lack of more detailed provisions in the GDPR on the applicable procedures in cross-border situations as well as the different criteria, in particular for the handling of complaints under national procedural laws. However, while recognising the challenges faced by the supervisory authorities in meeting those deadlines and in complying with the requirements of national procedural laws, the Council finds it important for the effective enforcement of the GDPR that the conditions of Article 60 are met.

(23) In the view of the Council, it is still early to assess the functioning of the cooperation and consistency mechanisms, given the short experience of their application. The Council therefore encourages the Commission to consult the supervisory authorities and the EDPB in the context of this review. The Council also encourages the EDPB to look into the question of finding efficient working arrangements in cross-border cases.

5. Margin left for national legislators

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

(25) However, the GDPR leaves a margin for a national legislator to maintain or introduce more specific provisions to adapt the application of certain rules of the GDPR. The margin is included in several articles of the GDPR. The Commission indicated in its Communication that it would pay particular attention to the national measures relating to the use of this margin for specification. According to the Commission, the national legislation should not introduce requirements going beyond the GDPR when there is no margin for specification, such as additional conditions for processing. The Council recalls that an adequate margin for national legislators was deemed necessary in many respects when the GDPR was negotiated. For example, Articles 6(2) and (3) of the GDPR allow the Member States to maintain or introduce more specific provisions to adapt the application of certain legal bases for the processing of personal data. A certain fragmentation caused by this margin was thus foreseen and is justified. The same applies, for instance, to Articles 85 and 86.

(26) However, a number of Member States have pointed out that the national margin has possibly resulted in some unintended consequences as it has, to some extent, contributed to a more fragmented legal landscape than was originally foreseen. For instance, a margin for national legislators has also been included in Article 8 of the GDPR, which provides for the age of consent of a child in relation to information society services ranging from 13 to 16 years. This has resulted in Member States adopting differing age limits.

(27) While a majority of Member States did not raise the differing age limits as an issue, a couple of Member States thought that this was problematic and suggested considering the introduction of a uniform age limit. The Council notes that this fragmentation with respect to the different age limits was foreseen when the decision to allow flexibility regarding the age limit was taken at the end of the negotiations of the GDPR. However, the possibility to choose different age limits as provided by Article 8 has given rise to legal uncertainty concerning the applicable law among the Member States in situations where the national laws of two Member States are applicable to a single processing activity.

(28) However, the Council notes that the GDPR and the national rules complementing it have only been applied for a short while. Sector-specific legislation is still being revised in many Member States. Therefore, it might be too early to draw definite conclusions about the overall level of legal fragmentation in the EU. It would be useful to get a better understanding of how the issue of overlapping territorial scopes of national laws implementing the GDPR has affected controllers and processors and how they are dealing with such situations.

(29) The Council also stresses the need to prevent the EU legal landscape from fragmentation as regards the protection of personal data. EU directives and regulations that contain provisions on the processing of personal data should be consistent with the GDPR or, if applicable, Directive (EU) 2016/680⁴ or Regulation (EU) 2018/1725⁵. The right to data protection should also be taken into account in an appropriate manner when creating policies that affect the processing of personal data.

6. New obligations for the private sector

(30) While the GDPR has to some extent reduced the administrative burden on controllers, it has also created certain new obligations. The increased workload that has resulted from this has in particular affected small and medium-sized enterprises (SMEs). According to the Communication, although the situation varies between Member States, SMEs have been among the stakeholders with the most questions about the application of the GDPR. Similarly, a few Member States have pointed out that some charitable or voluntary associations have been among those who have faced challenges with the documentation requirements.

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

⁵ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC.

(31) According to information from some Member States, SMEs are dissatisfied, for example, with the limited derogation from the obligation to maintain a record of processing activities. Article 30(5) of the GDPR exempts enterprises or organisations employing fewer than 250 persons from the requirement to maintain a record of processing activities, but under a set of conditions that only seldom apply. While recognising that the risk-based approach of the GDPR was a choice made by the legislator, the Council considers that it would be important to try and assess how the intended balance between the risk-based-approach, on the one hand, and the need to take into account the special needs of SME's (recital 13), on the other hand, works in practice.

(32) Another example of new obligations is the obligation to notify the supervisory authorities of personal data breaches and to document such breaches (Article 33 of the GDPR). According to information received from Member States, the number of notifications made so far at the EU level under Article 33 is significant. Therefore, it seems that this obligation has caused additional work for both the controllers and the supervisory authorities.

(33) Although under recital 13, Member States and their supervisory authorities are encouraged to take account of the specific needs of micro, small and medium-sized enterprises in the application of this Regulation, the Council agrees that some further guidance and support for SMEs from national supervisory authorities or the EDPB could be useful. Some supervisory authorities of Member States have already developed targeted guidance and tools for SMEs, to respond to their questions and needs. The Council underlines the role of those authorities and the EDPB in providing advice for SMEs and charitable or voluntary associations, and encourages them to be more active in this respect. Practical tools could also be developed by the supervisory authorities in order to help and facilitate SMEs in their compliance with the GDPR, such as a harmonised form for controllers and processors to notify the supervisory authorities of personal data breach, or a simplified record of processing.

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

(34) Member States have drawn attention to the possibility that controllers or processors not established in the Union might not comply with their obligations set out in the GDPR. One of those obligations is the requirement under Article 27 for controllers and processors to designate a representative in the Union. It is uncertain to what extent controllers established in third countries have complied with that obligation but according to information from Member States, there are cases where a representative has not been designated. It would be helpful to have information on the extent to which controllers or processors not established in the Union have designated a representative as required by Article 27 and what steps supervisory authorities are taking to ensure compliance with this obligation.

(35) Furthermore, under Article 30(2), the processor's representative shall maintain a record of all categories of processing activities carried out on behalf of a controller, which shall be made available to the supervisory authority on request. It is not entirely clear what the supervisory authority can do in situations where the representative does not comply with its obligation. Another aspect that may require further reflection is the scope of responsibility of a representative for non-compliance by the controller or the processor. The newly-updated guidance from the EDPB in this regard is therefore welcome.

8. Conclusions

(36) The Council calls for the Commission to take a broad view in its upcoming report going beyond Chapters V and VII which are explicitly mentioned in Article 97 of the GDPR. Given the importance and impact of the GDPR, there are strong arguments supporting a broader review and discussion on the topic, carefully taking into account the contributions from the Council, the European Parliament, and other relevant stakeholders such as the supervisory authorities.

(37) This document outlines those issues of application and interpretation of the GDPR that have raised most concerns in the Member States so far. The concerns relate, in particular, 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.

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

- the application of the GDPR in the field of new technologies as well as the issues related to big tech companies;
- practical tools for 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
- the issues relating to the situations where a representative of a controller or a processor established outside the EU does not comply with its obligations.

(39) Furthermore, many of these issues and topics, especially those within the field of competence of national legislators and the challenges related to emerging technologies, deserve further discussions and sharing of experiences between the Member States and the Commission. It should be explored what would be the appropriate forum for such discussions, which should not overlap with the work of the EDPB.

(40) As regards Chapter V, the Council encourages the Commission not only to review the existing adequacy decisions but also to examine the possibilities to adopt new adequacy decisions according to the requirements set by Union law, and to explore the possibility to specifically address transfers to and between public authorities when adopting such decisions. At the same time, the Council shares the view that it is equally important to address the application of the other tools available under Chapter V to provide controllers with more clarity on when appropriate safeguards could be considered to exist in the absence of an adequacy decision.

(41) As regards Chapter VII, the Council notes that some concerns have been raised as described in the foregoing. The Council considers that the cooperation among the supervisory authorities should be further strengthened. In this context, the relevance of the resources of the national supervisory authorities and of the EDPB should be addressed in the Commission's upcoming report. The Council considers that the procedural challenges relating to the application of Chapter VII should also be addressed. The Council encourages the Commission to consult the supervisory authorities and the EDPB.

(42) The Council notes the risk of fragmentation of legislation relating to the margin the Member States have to maintain or introduce more specific provisions to adapt the application of the rules of the GDPR. While that margin has been intentional for the specification of certain provisions of the GDPR and a certain fragmentation is therefore justified, the Council considers that the developments in this respect should be followed closely. In addition, the Council considers it necessary to take data protection aspects and the GDPR fully into account in relevant fields of EU policy and law-making.

(43) In the view of the Council, it is important to promote the European model established by the GDPR and to ensure legal certainty for all stakeholders in the forthcoming years. The Commission should therefore address in its report the issues relating to the aforementioned topics, and suggest appropriate means to resolve them. Furthermore, with a view to preparing for subsequent reports under Article 97, the Commission should continue monitoring and analysing experiences of application of the GDPR, particularly as regards the issues outlined in this document. The Council also stresses the importance of examining and clarifying how the GDPR is applied to and is able to respond to challenges posed by new technologies as soon as possible.
