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OPINION OF THE LEGAL SERVICE[1]

From:	Legal Service
To:	Working Party on Information Exchange and Data Protection
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 - compatibility with the Treaties of a possible minimal harmonisation clause introduced in the draft Regulation for certain activities carried out in the public sector

I. INTRODUCTION

1. In January 2012, the Commission submitted a proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data[2] (the "draft Regulation").

[1] This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

[2] Doc. 5853/12. The draft texts discussed in this Opinion are the ones presented by the Presidency in doc. 11028/14 (whole draft Regulation) and doc. 14270/14 (only Chapter II, Article 21 and Chapter IX of the draft Regulation).

It is based on Article 16 of the Treaty on the Functioning of the European Union ("TFEU") and will replace the existing legal framework set up by Directive 95/46/EC[3].

2. Directive 95/46/EC, which is based on Article 114 TFEU (internal market legal basis), applies to data processing activities in Member States in both the public and the private sectors, except as regards certain activities such as activities in the areas of judicial co-operation in criminal matters and police co-operation. In the *Lindqvist* case, the Court of Justice held that:

"*Directive 95/46 is intended, as appears from the eighth recital in the preamble thereto, to ensure that the level of protection of the rights and freedoms of individuals with regard to the processing of personal data is equivalent in all Member States. The tenth recital adds that the approximation of the national laws applicable in this area must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community. The harmonisation of those national laws is therefore not limited to minimal harmonisation but amounts to harmonisation which is generally complete. It is upon that view that Directive 95/46 is intended to ensure free movement of personal data while guaranteeing a high level of protection for the rights and interests of the individuals to whom such data relate*"[4] (emphasis added).

3. On 16 October 2014, the Presidency suggested to introduce in Article 1(2a) of the draft Regulation, as Option 1, a minimal harmonisation clause applicable to certain categories of data processing whereby:

"*Member States may maintain or introduce more stringent national provisions ensuring a higher level of protection of the rights and freedoms of the data subject, than those provided for in this Regulation, with regard to the processing of personal data by public authorities for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. [Each Member State shall notify to the Commission the text of the provisions referred to in this paragraph by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them]*."

Article 1(3) of the draft Regulation (the so-called "free movement clause") which reads "*the free movement of personal data within the Union shall neither be restricted nor prohibited for reasons connected with the protection of individuals with regard to the processing of personal data*" would remain unchanged.

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[3] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

[4] Case C-101/01, Judgment of the Court of 6 November 2003, paragraphs 95 and 96.

4. On 24 October 2014, the Presidency retained another option, Option 2, for Article 1(2a), than the one referred to in paragraph 3 above. This suggested provision for Option 2 reads as follows:

"(…) *Member States may maintain or introduce national provisions to further specify the application of rules of this Regulation with regard to the processing of personal data for compliance with a legal obligation or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or for other specific processing situations as provided for in Article 6(1)(c) and (e) by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX* (…)"[5].

5. In January 2012, the Commission submitted another legislative proposal which is the Proposal for a Directive of the European Parliament and of the Council on the protection of individuals 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 the free movement of such data (the "draft Directive")[6]. The draft Directive is, like the draft Regulation, based on Article 16 TFEU.

6. Article 1(1a) of the draft Directive contains a minimal harmonisation clause which reads:

"*This Directive shall not preclude Member States from providing higher safeguards than those established in this Directive for the protection of the rights and freedoms of the data subject with regard to the processing of personal data by competent public authorities*."[7]

Article 1(2) of the draft Directive reads:

"*In accordance with this Directive, Member States shall:*

(a) protect the fundamental rights and freedoms of individuals and in particular their right to the protection of personal data; and

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5 Doc. 14270/1/14 REV 1.

6 Doc. 5833/12. The draft text discussed in this Opinion is the one presented by the Presidency in doc. 11109/14.

7 In footnote 77 (doc. 11109/14) on the minimal harmonisation clause, it is stated that "(…) *Commission welcomed the insertion of the paragraph as long as the free flow of data was not hampered*".

(b) ensure that the exchange of personal data by competent public authorities within the Union is neither restricted nor prohibited for reasons connected with the protection of individuals with regard to the processing of personal data".

7. At the DAPIX Working Party meeting of 21-22 October 2014, the Legal Service gave an oral presentation on the legal implications of Option 1 (i.e. the minimal harmonisation clause combined with a free movement clause). At the DAPIX Working Party meeting of 28 October 2014, the Presidency requested the Legal Service to confirm this oral presentation in writing. This legal opinion further develops the oral intervention made by the Legal Service at those meetings.

II. LEGAL ISSUE

8. The legal issue is whether the possible introduction of Article 1(2a) of the draft Regulation containing a minimal harmonisation clause applicable to certain categories of data processing and combined with a free movement clause (Option 1 referred to in paragraph 3 above) would be compatible with the legal basis (Article 16 TFEU) and Article 8 of the Charter of Fundamental Rights of the European Union (the "Charter") as well as with the nature of a Regulation as a legal act pursuant to the second paragraph of Article 288 TFEU.

III. LEGAL FRAMEWORK

9. The second paragraph of Article 288 TFEU provides that "*[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States*."

10. Article 16 TFEU provides:

"*1. Everyone has the right to the protection of personal data concerning them.*

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities (…)" (emphasis added).

11. Article 8 of the Charter provides:

"*1. Everyone has the right to the protection of personal data concerning him or her.*

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority." (emphasis added).

IV. LEGAL ANALYSIS

A. The compatibility of a minimal harmonisation clause with Article 16 TFEU and Article 8 of the Charter

12. Whilst Directive 95/46/EC is based on Article 114 TFEU (internal market legal basis), the draft Regulation will be based on the new legal basis of Article 16 TFEU introduced by the Treaty of Lisbon.

13. Article 16(1) TFEU refers to the right to the protection of personal data which is guaranteed as a fundamental right in Article 8(1) of the Charter.

14. Article 16(2) TFEU empowers the Union legislature to adopt "rules" acting in accordance with a legislative procedure and therefore through adopting legislative acts. In cases where the legal basis does not specify the type of legal act to be adopted, as is the case here where Article 16(2) TFEU refers to "rules", "*… the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality*" (Article 296 TFEU)[8]. Such a legislative act, which is subject to Article 16(1) TFEU and Article 8 of the Charter, shall lay down rules relating to the protection of personal data and rules relating to the free movement of such data.

[8] In addition, Article 16(2) TFEU requires the Union legislature to act in accordance with the ordinary legislative procedure which is defined in Article 289(1) TFEU as a procedure which "*…shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission…*" (emphasis added).

15. Article 16 TFEU is therefore a legal basis which gives the co-legislators the competence to legislate by way of a regulation or a directive on rules relating to the fundamental right to data protection as guaranteed by Article 8 of the Charter, without subordinating that fundamental right to the need to ensure the free movement of such data. This clearly results from the *chapeau* in Article 16(1) TFEU which only refers to that fundamental right and the use, in Article 16(2) TFEU, of the conjunction "*and*" between, on the one hand, rules relating to personal data protection and, on the other hand, rules relating to the free movement of such data.

16. As already stated by the Legal Service in its contribution of 19 December 2013 on the one-stop shop[9], the Treaty of Lisbon has added Article 16 in the TFEU, in a Title (Title II of Part One) entitled "*Provisions having general application*", both as a fundamental principle and right (paragraph 1) and as a new horizontal legal basis (paragraph 2). Therefore, unlike the legal basis of Article 114 TFEU (on the basis of which Directive 95/46/EC was adopted) which requires that the approximating measures laid down by the Union legislature genuinely have as their object the improvement of the conditions for the functioning of the internal market,[10] the rules adopted on the basis of Article 16 TFEU must have as their preponderant object the protection of the fundamental right to the protection of personal data. This is so both because of the actual wording of Article 16 TFEU which does not require the improvement of the conditions for the functioning of the internal market - it only refers to rules relating to the free movement of data in addition to rules relating to the protection of personal data - and the fact that the right to the protection of personal data is a fundamental right. For these reasons, the rules relating to the free movement of personal data should not prevail over, or undermine the protection of this fundamental right. What Article 16 TFEU requires at most is that the conditions of exercise of this fundamental right should not impede the free movement of data.

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9 See doc. 18031/13 on the issue of "effective judicial protection of data subjects' fundamental rights in the context of the envisaged "one-stop shop" mechanism" in the draft Regulation.

10 Case C-491/01, *British American Tobacco*, point 75.

17. The Legal Service has already taken a view on the possibility to introduce a minimal harmonisation clause in legislative acts based on Article 114 TFEU (internal market legal basis). The Legal Service has indeed stated, in this context, that such a clause could be used in cases where the intention is to introduce a step by step harmonisation and that in line with the Court case law interpreting Article 114 TFEU[11], the introduction of such a clause would necessitate the inclusion of another clause providing for the free movement of the products/services which comply with the minimum requirements[12].

18. Even though the draft Regulation is not based on Article 114 TFEU, the Legal Service considers that the need to clarify the legislature's intention on the introduction of a step by step harmonisation is still relevant on the basis of Article 16 TFEU, given in particular the current drafting of the draft Regulation[13] and the fact that the Court already interpreted Directive 95/46/EC, which the draft Regulation will replace, as amounting generally to complete harmonisation.

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11 Case C-376/98, judgment of the Court of 5 October 2000, points 103 and 104; Case C-491/01, judgment of the Court of 10 December 2002, point 74.

12 See e.g. Opinion of 20 November 2009, doc. 16410/09, points 11 and 12 and Opinion of 27 September 2001, doc. 12244/01, points 22 and 23.

13 See e.g. the relevant parts of Recitals 8 and 11: "*In order to ensure a consistent and high level of protection of individuals and to remove the obstacles to flows of personal data within the Union, the level of protection ...should be equivalent in all Member States …*", "*in order to ensure a consistent level of protection for individuals throughout the Union and to prevent divergences hampering the free movement of data within the internal market…*".

Therefore, with a view to bringing such a clarification, in addition to the suggested Article 1(2a), Recital 11 should be completed to clearly state that the Regulation[14] only aims at partial harmonisation and to justify such a nuanced approach, i.e. a combination of full harmonisation of the rules applicable to activities where a consistent level of protection of the rights of data subjects can be achieved and is desirable (such as commercial activities pursued by private or public entities) and of minimum harmonisation of the rules applicable to certain identified activities carried out by public authorities for which the Regulation would only set uniform minimum requirements and would expressly authorise Member States to afford a higher level of protection of the rights of data subjects insofar as such rules are necessary.

However, unlike Article 114 TFEU, the need to combine the minimal harmonisation clause applicable to a limited scope of activities with a free movement clause is not a requirement stemming from Article 16 TFEU but rather from one of the objectives which the draft Regulation as laid down in its Article 1(1). Therefore, in line with that objective, the free flow of data in the public sector can be ensured by way of a free movement clause which should be maintained in Article 1(3).

19. Furthermore, the minimal harmonisation clause should also specify that the more stringent national rules should be compatible with the Treaty[15].

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14 As opposed to Directive 95/46/EC which did not contain such a statement and has therefore been interpreted by the Court as amounting to harmonisation which is "*generally complete*".

15 For example the compatibility of the national rules with the principle of non-discrimination and other fundamental rights guaranteed by the Charter.

20. As regards the possible discrimination that would stem from the fact that some data subjects may benefit from different levels of data protection in the public sector, it should be first noted that nothing in Article 8 or Article 53 of the Charter[16] or in Article 16 TFEU prohibits Member States, where this is expressly authorised by the draft Regulation and objectively justified[17], to provide for a higher level of protection than the general level of protection provided by the Regulation.

21. Secondly, according to the case law of the Court, there is discrimination where the Union legislation treats "*either similar situations differently or different situations identically*"[18]. In this case, it is not established that a discrimination between data subjects (i.e. by treating similar situations differently) will necessarily occur, since the situation for data subjects (in particular with regard to the degree of interference with their fundamental right to the protection of their personal data) may not always be the same for all categories of personal data in all areas of the public sector in all Member States, particularly where the co-legislators choose to follow a partial harmonisation approach.

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16 Article 53 of the Charter expressly allows Member States' constitutions, under certain conditions, to provide for a higher level of protection of human rights and fundamental freedoms recognised by the Charter. In the *Melloni* case (Case C-399/11, judgement of the Court of 26.2.2013), the Court indeed held that "*it is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised*" (point 60).

17 The fact that the draft Regulation would expressly authorise Member States to provide for a higher level of protection for non-commercial activities in the public sector, with an objective justification for such an empowerment together with the introduction of a free movement clause, should lead to the conclusion that the primacy, unity and effectiveness of EU law are not compromised, within the meaning of the above-mentioned *Melloni* case (C-399/11).

18 See e.g. Case 13/63, *Italy v. Commission* and Case 8/82, *Wagner*, point 18.

Furthermore, even if a differentiated treatment able to constitute a discrimination could be established, it may be lawful if it justified objectively[19] and proportionate to the objective sought[20]. Such an objective justification could for example result from the fact that the activities of public authorities in the public interest are generally carried out unilaterally without the consent of the data subject and thus risk creating a more serious interference in their rights[21]. Such an objective justification would be even more convincing if the scope of the minimal harmonisation clause would rather be based on the type of data in specific fields (e.g. in the fields of medical, social security or employment data) which are likely to create higher risks and more serious interference in data subjects' rights rather than on an organic criterion (i.e. public authorities) combined with a functional criterion which is broad (i.e. a task carried out in the public interest or in the exercise of official authority vested in the controller).

22. The Legal Service also notes that the Commission has accepted that there will be different levels of data protection in the draft Directive referred to in paragraphs 5 and 6 above, given the introduction of a minimal harmonisation clause therein. Likewise, the Legal Service notes that the Commission has accepted that there will be different levels of data protection in the draft Regulation as it has proposed, and this has been accepted, that Member States could be allowed to derogate from the harmonised level of protection by providing a lower protection in certain cases (see Article 21 of the draft Regulation).

B. The compatibility of the minimal harmonisation clause with the nature of a regulation as defined in Article 288 TFEU

23. Unlike a directive, the rules contained in a regulation will be directly applicable in all Member States (Article 288 TFEU).

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19 See e.g. Joined Cass 117/76 and 16/77 *Ruckdeschel*, point 7.
20 See e.g. Case C-29/95 *Pastoors and Trans-Cap*, points 19 to 26.
21 For example the national rules on passports, identity cards and the registers of foreigners.

24. This entails the following consequences:

a) firstly, Member States may maintain or introduce national rules outside the scope of the regulation as defined in Article 2 of the draft Regulation, without the need for an additional provision in the draft Regulation;

b) secondly, unless otherwise expressly provided, Member States are precluded from maintaining or introducing national law in the fields covered by the regulation, to transpose the regulation[22]. This means that the provisions of the draft Regulation which, in the field covered by the minimal harmonisation clause, would constitute minimum requirements, should generally not be transposed into national law;

[22] The Court of Justice has held, for example, that "*since* [a regulation]*, in conformity with the second paragraph of* [Article 288 TFEU]*, is directly applicable in all Member States, the latter, unless otherwise expressly provided, are precluded from taking steps, for the purposes of applying the regulation, which are intended to alter its scope or supplement its provisions*" (Case 40/69, judgement of the Court of 18.2.1970, *Hauptzollamt Hamburg*, point 4).

c) thirdly, national law in the fields covered by the regulation may be maintained or introduced to implement[23] within the meaning of Article 291(1) TFEU[24] the provisions of the regulation and/or where those provisions expressly authorise so, to supplement[25] or, to derogate from[26] the provisions of the regulation if the scope and nature of the derogations are described by way of a general rule defining objective criteria for their application, such derogations are objectively justified and such justification is presented clearly in the preamble to the regulation[27].

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23 The Court of Justice has held for example that "*the fact that a regulation is directly applicable does not prevent the provisions of that regulation from empowering a Community institution or a Member State to take implementing measures. In the latter case the detailed rules for the exercise of that power are governed by the public law of the Member State in question; however, the direct applicability of the measure empowering the Member State to take the national measures in question will mean that the national courts may ascertain whether such national measures are in accordance with the content of the Community regulation*" (Case 230/78, *Eridania*, Judgement of the Court of 27.9.1979, point 34). The concept of "implementing" a regulation has been interpreted broadly by the Court where it was satisfied that "*in view of the diversity of national situations, the Union legislature could allow the Member States a degree of latitude regarding both the principle of Community and national compensation and the implementing arrangements and each Member State was accordingly authorised to determine the level of compensation*" (Case C-251/91, Judgement of the Court of 11.11.1992, *Teulie*, points 13 to 15). The Court also accepted that some provisions of a regulation may "*necessitate, for their implementation, the adoption of measures of application by the Member States*" (Case C-403/98, Judgment of the Court of 11.1.2001, *Azienda Agricola Monte Arcosu*, point 26) leaving for example to Member States the obligation to define certain natural persons falling within the material scope of the regulation and concluding that "*in the light of the discretion enjoyed by the Member States in respect of the implementation of those provisions [*of a regulation*], it cannot be held that individuals may derive rights from those provisions in the absence of measures of application adopted by the Member States*" (Case C-403/98, point 28).

24 Article 291(1) TFEU provides: "*Member States shall adopt all measures of national law necessary to implement legally binding Union acts*".

25 See *a contrario*, Case 40/69, judgement of the Court of 18.2.1970, *Hauptzollamt Hamburg*, point 4.

26 The Court of Justice accepted derogations or exemptions in a regulation provided that they are expressly provided for in the regulation. For example, in Case 50/76, Judgement of the Court of 2.2.1977, point 34, the Court held: "*as regards the question of the authorization by a national authority of an exemption from the minimum prices fixed by the Community, it must be stated that neither Regulation No 234/98 nor its implementing regulations provide for any such possibility*". In Case 101/78, Judgement of the Court of 13.2.1979, *Granaria*, point 8, the Court's reasoning *a contrario* shows that derogations by national authorities in a regulation are permissible where an "*express provision*" to that effect is contained in the regulation. This *Granaria* case law has been confirmed more recently in Case C-214/04, *Commission v. Italy*, Judgement of the Court of 7.7.2005, point 27.

27 See Opinion of the Legal Service of 16 June 2014, doc. 11019/14, points 26 to 29.

For example, Article 21 of the draft Regulation[28] already introduces the possibility for Member States' laws to derogate from certain provisions of the draft Regulation in clearly defined circumstances and subject to the principle of proportionality. In other regulations (based on Article 114 TFEU), there are examples of clauses with a limited scope which allow Member States to adopt more stringent or restrictive national laws[29].

25. On the basis of the above case law, the minimal harmonisation clause as suggested by the Presidency in Option 1 (see paragraph 3 above) could lawfully be introduced in the draft Regulation, without affecting the direct applicability of the draft Regulation. Indeed, the provisions of that regulation would constitute minimum requirements for some parts of the public sector, as specified, which would apply uniformly in all Member States and an express provision allowing Member States to maintain or introduce more stringent national laws, combined with a recital, would be introduced.

As it was drafted on 16 October 2014, the minimal harmonisation clause (Option 1) would allow Member States not only to adopt additional national rules but also to derogate from the provisions of the draft Regulation for certain activities, insofar as those national rules ensure a higher level of protection for data subjects than the minimum requirements laid down in the draft Regulation. Such a possibility for Member States to derogate from the provisions of the draft Regulation in order to ensure a higher level of protection for the non-commercial activities carried out by public authorities will have to be objectively justified in the preamble of the draft Regulation (see paragraph 21 above).

26. The difference between Option 1, referred to in paragraph 3 above, and Option 2[30] for Article 1(2a), referred to in paragraph 4 above, is as follows. In Option 2, national laws may only implement certain provisions of the draft Regulation by further specifying or by determining more precisely specific requirements.

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28 Doc. 142170/1/14 REV 1.

29 See for example, in Article 39 of Regulation (EU) No 1169/2011 of 25 October 2011 on the provision of food information to consumers (OJ L 304, 22.11.2011, p. 18) or in Article 14(2) of Regulation (EC) No 648/2004 of 31.3.2004 on detergents (OJ L 104, 8.4.2004, p.1)

30 Doc. 14270/1/14 REV1.

This means that national implementing laws in Option 2 should always comply with all the provisions of the draft Regulation without any possibility for derogations and that the level of protection as guaranteed by the draft Regulation should not be affected by the national implementing laws, except in cases provided for in Article 21 of the draft Regulation. In other words, Option 2 would allow for more detailed national rules which will have to comply with all the provisions of the draft Regulation, such as those which lay down general principles (e.g. Article 5 of the draft Regulation[31]) as well as fully harmonised exceptions and restrictions introduced by the draft Regulation which should not be reduced or expanded, unless otherwise expressly provided for by the draft Regulation. For example, Article 21, Article 9(2), Article 14a(4) and Article 17(3) of the draft Regulation[32] contain fully harmonised lists of restrictions and exceptions which, under Option 2, could be further specified but not reduced or expanded. It should also be noted that Option 1 and Option 2 can be combined if the co-legislators so decide. It would indeed be possible to combine a minimal harmonisation clause with a clause allowing Member States to also maintain and adopt national implementing laws which further specify the provisions of the Regulation.

[31] Doc. 11028/14.
[32] Doc. 11028/14.

V. CONCLUSION

27. The Legal Service is of the opinion that:

a) the minimal harmonisation clause as suggested by the Presidency in Option 1 (see paragraph 3 above) for certain activities in the public sector, combined with a free movement clause, could lawfully be introduced in Article 1(2a) of the draft Regulation, in conformity with Article 16 TFEU and Article 8 of the Charter, without affecting the direct applicability of the regulation. The provisions of the draft Regulation would constitute minimum requirements for certain activities of the public sector which would apply uniformly in all Member States;

b) this clause, which would constitute an express provision allowing Member States to maintain or introduce more stringent national laws compatible with the Treaty, should be combined with a recital. The recital should, firstly, clearly state the legislature's intent which is to aim at partial harmonisation (i.e. a combination of full harmonisation for the private sector and of minimal harmonisation for certain specific activities) and the reasons for such an approach and, secondly, objectively justify the need for a higher level of protection at national level for those categories of personal data subject to the minimal harmonisation clause.