



Council of the  
European Union

Brussels, 27 March 2015  
(OR. en)

7586/15

LIMITE

**DATAPROTECT 40**  
**JAI 197**  
**MI 199**  
**DIGIT 9**  
**DAPIX 48**  
**FREMP 62**  
**COMIX 144**  
**CODEC 431**

---

---

**Interinstitutional File:**  
**2012/0011 (COD)**

---

---

**NOTE**

---

From: CZ, DE, IE, NL, AT, PL and FI delegations  
To: Working Group on Information Exchange and Data Protection (DAPIX)  
No. prev. doc.: 7084/15 DATAPROTECT 31 JAI 169 MI 159 DRS 23 DAPIX 39 FREMP  
50 COMIX 114 CODEC 336  
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)  
- Chapters III and VIII

---

Delegations find in Annex comments from CZ, DE, IE, NL, AT, PL and FI delegations on General  
Data Protection Regulation - Chapters III and VIII.

## TABLE OF CONTENT

	<b>Pages</b>
<b>CZECH REPUBLIC</b>	<b>3</b>
<b>GERMANY</b>	<b>6</b>
<b>IRELAND</b>	<b>11</b>
<b>NETHERLANDS</b>	<b>14</b>
<b>AUSTRIA</b>	<b>26</b>
<b>POLAND</b>	<b>35</b>
<b>FINLAND</b>	<b>43</b>

**Proposals on Chapter III and Chapter VIII**

**Recital 53a**

*CZ is doubtful whether to keep recital 53a, which is dealing with single judgment. If so, however, **Recital 53a** should be amended to avoid overreach of the second sentence:*

Inasmuch as the removal of links from the list of internet search results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter. Whilst **in such cases** the data subject's rights protected by those articles should override, as a general rule, the interest of internet users, that balance may in specific cases depend on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having access to that information, an interest which may vary, in particular, according to the role played by the data subject in public life.

**Recital 54aa**

Of the first part, only the first sentence should be kept, as the rest may be interpreted to limit the other rights unduly.

**Article 17 – Right to be forgotten and to erasure**

**Paragraph 1(d)** should read:

“the data have been unlawfully processed **(manifestly) in abusive manner**”.

*The goal is to prevent larger injustice in cases when someone in past has not complied fully with all the duties of the Regulation, and now a different controller relies on the data to pursue e.g. his legitimate interests. Erasure of data is the strongest measure available and should be moderated.*

**Paragraph 2a** should read:

*Where the controller (...) has made the personal data public and is obliged pursuant to paragraph 1 to erase the data, the controller, taking account of available technology and the cost of implementation, shall **on request of data subject** take (...) reasonable steps, including technical measures, (...) to inform **known controllers to which it intentionally disclosed** ~~which are processing the~~ data, that a data subject requests them to erase any links to, or copy or replication of that personal data.*

*CZ disagrees with this duty, both because it may easily backfire on the data subject (who would not request erasure from certain controllers depending on the context that may change rapidly as evident from paragraph 3) and because it will be difficult to implement and enforce (hence the second amendment, which is at least subject to review of DPA). But our general aim is to give data subject a little more control over the process – there may be reason to ask search engine, but to avoid, at the same time, a social network or news website.*

#### **Article 77 – Right to compensation and liability**

*CZ wishes to propose a compromise system that would both protect the data subject and provide for sufficient flexibility to enterprises which should be free to adopt fitting models of dealing with complaints. Paragraph 2 should be complemented by paragraph 2a, which would read:*

**However, the first sentence of paragraph 2 shall not apply where a controller or processor clearly and without reservation indicates to the data subject that any such claims should be pursued against such controller or processor.**

#### **Article 79 – General conditions for imposing administrative fines**

*CZ really wishes to preserve a room for manoeuvre for the national DPAs in relation to sanctions imposed on natural persons who are not entrepreneurs. Absolute upper limits are good, but the danger is that EDPB would create single approach that does not respect different (average, median) income levels in Member States. Therefore, we propose to change **paragraph 2a(m)** as follows:*

**“any other aggravating or mitigating factor applicable to the circumstances of the case or to specific situation.”**

*This should allow any DPA to see imposition of fine on natural person that is not performing its trade, business or profession as specific situation and respect that overall income levels in its Member State are lower or higher than the average.*

**Alternatively, a recital could be introduced, saying that where the fines are imposed on (natural) persons that are not undertaking, the supervisory authorities may take into account the general level of income in the Member State in considering the appropriate amount of fine.**

## Article 79b – Penalties

*If the intent really is to (a) provide the Member States with opportunity to stipulate criminal sanctions to supplement the administrative ones and (b) provide the Member States with opportunity to cover infringements of provisions not listed in Article 79a, then paragraph 1 should read:*

For infringements of the provisions of this Regulation not listed in Article 79a Member States **may** ~~shall~~ lay down the rules on **criminal** penalties applicable to such infringements and shall take all measures necessary to ensure that they are implemented (...). **For infringements of the provisions of this Regulation not listed in Article 79a** Member States **may** ~~shall~~ lay down the rules on **penalties applicable to such infringements and shall take all measures necessary to ensure that they are implemented (...).** Such penalties shall be effective, proportionate and dissuasive.

*CZ opposes the word “shall”, as it is too strict and indeed, does not make good sense in the current text.*

Comments and proposals by the German delegation concerning  
Recitals 46 - 59 and Articles 11 - 21 of the General Data Protection Regulation  
(changes in *bold and italics*)

*Recital 48a new*

*Among other things, Article 21 provides for restrictions by way of legislative measures to the right of access and other rights, for example in the interest of public security or the protection of judicial independence. In formulating these specific exceptions pursuant to Article 21 as needed, the Member States may, in their national law, repeat the wording of the various rights and provisions under the General Data Protection Regulation if the national legislators find this to be necessary in the interest of legal practitioners.*

**Justification:**

- German legislation contains numerous exceptions from data subjects' rights that are necessary because they protect the rights and legitimate interests of third parties and of the data processor as well as public interests (this refers particularly to Sections 19 II through IV; 19a III; 33 II; 34 VII of the Federal Data Protection Act). Very few of these exceptions are contained in the current Council draft. Article 21 provides for the possibility to adopt additional exceptions from data subjects' right, this would mean adopting a national act consisting largely of exceptions. We therefore propose a recital allowing member states to adopt national legislation defining the rights of data subjects in accordance with Chapter III of the General Data Protection Regulation (and insofar repeating the GDPR) and its respective exceptions.

- Because of the direct effect a Regulation has, within the scope of application of a Regulation, member states, as a rule, are not allowed to pass legislation repeating the provisions of that Regulation. However, since the proposed Regulation takes the form of a General Regulation, it provides considerable room for member states to take national legislative measures, e.g. under Article 21. As a result, data protection law will become a complex regulatory system consisting of Union law and member state law turning the application of the law into a challenging task for all parties to which it is addressed. Given this special constellation, it appears appropriate to allow national legislation to repeat certain aspects set out in the Regulation where this is necessary to ensure consistency and understandability for addressees (see ECJ Judgment of 28 March 1985, Commission / Italy (272/83, ECR 1985 p. 1057).

### Recital 53a

Inasmuch as the removal of links from the list of internet search results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter. ~~*Whilst the data subject's rights protected by those articles should override, as a general rule, the interest of internet users, that balance may in specific cases depend on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having access to that information, an interest which may vary, in particular, according to the role played by the data subject in public life.*~~

#### Justification:

Die Aussage des Urteils des Europäischen Gerichtshofs, wonach ein genereller Vorrang des Datenschutzes vor der Meinungsbildungs- und Informationsfreiheit bestehen soll, sollte nicht in die Erwägungsgründe aufgenommen werden, weil sie sich auf eine spezielle Konstellation bezieht, in der die Gefahr einer Profilbildung vom EuGH als besonders groß angesehen wurde (Suche mit dem Namen einer Person). Es handelt sich um das erste Urteil zu dieser Problematik. Auch angesichts der materialreichen Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte wird es zu weiteren Konkretisierungen kommen.

## *Recital 54aa*

*However the right to be forgotten should be balanced with other fundamental rights. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. This may lead to the result that the personal data has to be maintained for exercising the right of freedom of expression, when required by law or for archiving purposes in the public interest or for historical, statistical and scientific (...) purposes, or, for reasons of public interest in the area of public health or social protection, or for the establishment, exercise or defence of legal claims.*

*In order to exercise the right to be forgotten, the data subject may address his request to the controller without prior involvement of a public authority, such as a supervisory or judicial authority, without prejudice to the right of the data subject to lodge a complaint or initiate court proceedings against the decision taken by the controller. In these cases it should be the responsibility of the controller to apply the balance between the interest of the data subject and the other interests set out in this Regulation.*

**Justification:**

**Clarification.**

## *Art. 17c*

### *Dispute Settlements*

- (1)** *If a data subject asks a controller operating an Internet search engine (Internet search engine operator) to remove links to web pages from the list of results displayed following a search made on the basis of a data subject's name, published by third parties and containing information relating to that data subject, claiming that the information published violates his privacy, the Internet search engine operator must carefully investigate, whether the requirements of the data subject's right pursuant to Articles 17 or 19 are fulfilled and must hereby respect the rights and interests of any third party affected.*

- (2) *The Internet search engine operator must provide a third party seriously affected an opportunity to submit an opinion on the data subject's request.*
- (3) *The Internet search engine operator must inform the enquiring data subject and the third party seriously affected about the decision and, especially in respect of Article 17 (3), all substantial aspects which were taken into account in the decision-making process.*
- (4) *The Internet search engine operators should set up dispute settlement units in the Member States. The autonomy, independence and plurality of the dispute settlement units and the expertise of their staff must be guaranteed. The dispute settlement units decide about complaints against the Internet search engine operator's decisions pursuant to paragraph 3; these decisions are binding only for the Internet search engine operator. Other remedies of the enquiring data subject and the affected third party, especially the web page operator, in particular according to Chapter VIII, remain unaffected.*

## Art. 20

### Profiling

[...]

- (4) *Decisions referred to in paragraphs 1 and 1a that have the effect of discriminating against individuals on the basis of race or ethnic origin, political opinions, religion or beliefs, trade union membership, genetic or health status, sexual orientation or that result in measures which have such effects, shall be prohibited. The controller shall implement effective protection against possible discrimination resulting from such decisions.*
- (5) *The data subject shall have the right to obtain information in a plausible and generally understandable form concerning*
  - (a) *the structure and process of the profiling and*
  - (b) *the calculation and significance of the probability values including the types of data used with reference to the individual case.*

*The right to obtain information shall not apply where the request is in conflict with overriding legitimate interests, in particular where trade secrets of the controller would be disclosed.*

**(6) *The controller shall***

- (a) *if necessary to ensure fair and transparent processing in respect of the data subject, having regard to the specific circumstances and context in which the personal data are processed, use [recognized] mathematical or statistical procedures for the profiling,***
- (b) *implement technical and organisational measures appropriate to ensure that factors which result in data inaccuracies are corrected and the risk of errors is minimized,***
- (c) *secure personal data in a way which takes account of the potential threats involved for the interests and rights of the data subject.***

**CHAPTER III**

**Article 17**

Paragraph 2a needs to be re-examined in the light of the Google Spain case. In that case the Court noted that the fact that a person might want a search engine to delete a link to personal data in relation to him/her doesn't necessarily mean that the data subject wants the data deleted from the original source. In other words the fact that a data subject wants one controller to delete personal data doesn't automatically mean that he/she wants all controllers to do so. We favour deletion of paragraph 2a for this reason.

**Article 18**

We support the right to data portability. We are concerned that the reference to the 'right to transmit personal data' has the effect of narrowing the scope of the right to data portability. Our preference would be to replace the word 'transmit' with 'withdraw'.

The right to withdraw personal data should apply only to data provided by the data subject.

This article contains an important data subject right; it should not impose an obligation on controllers to transfer the personal data to another controller.

In order to ensure legal certainty, the text should specify that this right does not apply to controllers processing personal data in the exercise of their public duties (i.e. include text currently located in recital 55).

**Article 20**

The definition of profiling (article 4(12a)) should cover all types of automated processing (see corresponding text in document 17831/13 of 16 December 2013).

This article should then apply to profiling which produces legal effects or significantly affect a data subject.

The following words should be deleted from paragraph 1: ‘a decision evaluating personal aspects relating to him or her’;

We do not understand how paragraph 1b would apply in cases where a decision is required under Union or Member State law to which the controller is subject (i.e. to situations where paragraph 1a(b) applies). We would therefore suggest that paragraph 1a(b) should be excluded from the scope of paragraph 1b.

## **CHAPTER VIII**

### **Article 76**

It should be clarified in a recital that this article does not provide for class actions.

### **Article 77**

This article needs to specify who the data subject can seek compensation from.

### **Article 79**

Our understanding of paragraph 1 of this article is that it gives supervisory authorities the power to impose administrative fines but leaves it to the discretion of the supervisory authority concerned as to whether a fine should be imposed in any particular case. In order to avoid uncertainty, “Administrative fines shall,” should be replaced with ‘Administrative fines may,’.

A reference to article 51a should be added after “Article 51” in paragraph 1..

We support the retention of point (g) of paragraph 2a.

### **Article 79a**

It is essential under our legal system that a controller or processor knows when he/she is, or will be, in breach of the Regulation which may result in the imposition of administrative fine. Legal certainty is essential. However, some of the grounds on which a fine can be imposed are too vague, in particular the following –

- (i) “incomplete information” (para. 2(a))
- (ii) “timely or in a sufficiently transparent manner” (para. 2(a))
- (iii) “not sufficiently determine” (para. 2(e))
- (iv) “not sufficiently maintain” (para. 2(f))
- (v) Paragraph 3(e);
- (vi) “timely” (para. 3(h))

### **Article 79b**

This article should only cover infringements not already covered under article 79a.

It should not provide for the imposition of criminal penalties.

*Article 14*

***Information to be provided where the data are collected from the data subject***<sup>1</sup>

- 1<sup>2</sup>. Where personal data relating to a data subject are collected from the data subject, the controller shall (...), at the time when personal data are obtained, provide the data subject with the following information:
- (a) the identity and the contact details of the controller and, if any, of the controller's representative; the controller may also include the contact details of the data protection officer, if any;
  - (b) the purposes of the processing for which the personal data are intended (...).

---

<sup>1</sup> DE, EE, ES, NL, SE, FI, PT and UK scrutiny reservation. DE, supported by ES and NL, has asked the Commission to provide an assessment of the extra costs for the industry under this provision.

<sup>2</sup> HU thought the legal basis of the processing should be included in the list.

- 1a. In addition to the information referred to in paragraph 1, the controller shall<sup>3</sup> where appropriate provide the data subject with such further information<sup>4</sup> necessary to ensure fair and transparent processing in respect of the data subject<sup>5</sup>, having regard to the specific circumstances and context in which the personal data are processed<sup>6</sup>:
- (a) (...);
  - (b) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party, the interests, fundamental rights and freedoms of the data subjects concerned and the result of the weighing of these interests, pursuant to Article 6 (1), point (f):
  - (c) the recipients or categories of recipients of the personal data<sup>7</sup>;
  - (d) where applicable, that the controller intends to transfer personal data to a recipient in a third country or international organisation;
  - (e) the existence of the right to request from the controller access to and rectification or erasure of the personal data or restriction of processing of personal data concerning the data subject and to object to the processing of such personal data (...)<sup>8</sup>;

---

<sup>3</sup> DE, EE, and PL asked to insert "on request". DE, DK, NL and UK doubted whether the redraft would allow for a sufficient risk-based approach and warned against excessive administrative burdens/compliance costs. DK and UK in particular referred to the difficulty for controllers in assessing what is required under para. 1a in order to ensure fair and transparent processing. DE, EE and PL pleaded for making the obligation to provide this information contingent upon a request thereto as the controller might otherwise take a risk-averse approach and provide all the information under Article 14(1a), also in cases where not required. UK thought that many of the aspects set out in paragraph 1a of Article 14 (and paragraph 2 of Article 14a) could be left to guidance under Article 39.

<sup>4</sup> CZ suggested adding the word 'obviously'.

<sup>5</sup> FR scrutiny reservation.

<sup>6</sup> COM reservation on deletion of the words 'such as'.

<sup>7</sup> AT and DE thought that this concept was too vague (does it e.g. encompass employees of the data controller?).

<sup>8</sup> The reference to direct marketing was deleted in view of comments by DK, FR, IT and SE.

- (f) the right to lodge a complaint to a supervisory authority (...);
- (g) whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as **whether the data subject is obliged to provide the data and of the possible consequences of failure to provide such data**<sup>10</sup>;
- (h) *the existence of **automated decision making including** -profiling referred to in Article 20(1) and (3) and information concerning (...) the **processing**, as well as the significance and the envisaged consequences of such **processing** for the data subject.*<sup>11</sup>

**1b. Where the controller intends to process the data in accordance with Article 6, (3), (3a) and (4) for another purpose than the one for which the data were collected, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 1a.**

2. (...) <sup>12</sup>
3. (...)
4. (...)
5. Paragraphs 1, 1a and 1b shall not apply where and insofar as the data subject already has the information.

<sup>9</sup> NL considers that Art. 14 para 1 (ea) is already covered in Art. 7, para 3.

<sup>10</sup> CZ, DE, ES and NL reservation.

<sup>11</sup> SE scrutiny reservation.

<sup>12</sup> HU reservation on the deletion of this paragraph.

**Information to be provided where the data have not been obtained  
from the data subject<sup>13</sup>**

- 1<sup>14</sup>. Where personal data have not been obtained from the data subject, the controller shall provide the data subject with the following information:
- (a) the identity and the contact details of the controller and, if any, of the controller's representative; the controller may also include the contact details of the data protection officer, if any;
  - (b) the purposes of the processing for which the personal data are intended.
2. In addition to the information referred to in paragraph 1, the controller shall where appropriate provide the data subject with such further information necessary to ensure fair and transparent processing in respect of the data subject, having regard to the specific circumstances and context<sup>15</sup> in which the personal data are processed (...):
- (a) the categories of personal data concerned;
  - (b) (...)
  - (c) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party, the interests, **fundamental rights and freedoms of the data subjects concerned and the result of the weighing of these interests, pursuant to Article 6 (1), point (f);**
  - (d) the recipients or categories of recipients of the personal data;

---

<sup>13</sup> DE, EE, ES, NL (§§1+2), AT, PT scrutiny reservation.

<sup>14</sup> HU thought the legal basis of the processing should be included in the list.

<sup>15</sup> ES, IT and FR doubts on the addition of the words 'and context'.

(e) the existence of the right to request from the controller access to and rectification or erasure of the personal data concerning the data subject and to object to the processing of such personal data (...);

**(ea) where the processing is based on point (a) of Article 6(1), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;**

(f) the right to lodge a complaint to a supervisory authority (...);

(g) the origin of the personal data, unless the data originate from publicly accessible sources<sup>16</sup>;

*(h) the existence of **automated decision making including** profiling referred to in Article 20(1) and (3) and information concerning (...) the **processing**, as well as the significance and the envisaged consequences of such **processing** for the data subject.*<sup>17</sup>

3. The controller shall provide the information referred to in paragraphs 1 and 2<sup>18</sup>:

(a) within a reasonable period after obtaining the data, having regard to the specific circumstances in which the data are processed, or

(b) if a disclosure to another recipient is envisaged, at the latest when the data are first disclosed.

---

<sup>16</sup> COM and AT scrutiny reservation.

<sup>17</sup> PL asks for the deletion of the reference to 'logic'.

<sup>18</sup> BE proposed to add: 'possibly through an easily accessible contact person where the data subject concerned can consult his data'. This is already covered by the modified recital 46.

**3a Where the controller intends to process the data in accordance with Article 6 (3), (3a) and (4) for another purpose than the one for which the data were obtained, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2.**

4. Paragraphs 1 to 3 shall not apply where and insofar as:

- (a) the data subject already has the information; or
- (b) the provision of such information (...) proves impossible or would involve a disproportionate effort or is likely to render impossible or to seriously impair the achievement of the purposes of the processing<sup>19</sup>; in such cases the controller shall take appropriate measures to protect the *data subject's rights and freedoms and legitimate interests*<sup>20</sup>; or
- (c) obtaining or disclosure is expressly laid down by Union or Member State law to which the controller is subject, which provides appropriate measures to protect the data subject's legitimate interests<sup>21</sup>; or
- (d) where the data originate from publicly available sources<sup>22</sup>; or
- (e) where the data must remain confidential in accordance with a legal provision in Union or Member State law or because of the overriding legitimate interests of another person<sup>23</sup>.

---

<sup>19</sup> COM scrutiny reservation.

<sup>20</sup> Several delegations (DE, DK, FI, PL, SK, and LT) thought that in this Regulation (contrary to the 1995 Directive) the text should be specified so as to clarify both the concepts of 'appropriate measures' and of 'legitimate interests'. According to the Commission, this should be done through delegated acts under Article 15(7). DE warned that a dangerous situation might ensue if these delegated acts were not enacted in due time.

<sup>21</sup> UK thought the requirement of a legal obligation was enough and no further appropriate measures should be required.

<sup>22</sup> COM, IT and FR reservation on this exception. ES thought this concept required further clarification. DE and SE emphasised the importance of this exception.

<sup>23</sup> COM and AT reservation on (d) and (e). UK referred to the existence of case law regarding privilege (confidentiality). BE thought the reference to the overriding interests of another person was too broad.

5. (...)

6. (...)

*Article 16*

***Right to rectification***<sup>24</sup>

1. (...) The data subject shall have the right<sup>25</sup> to obtain from the controller the rectification of personal data concerning him or her which are inaccurate. Having regard to the purposes for which data were processed, the data subject shall have the right to obtain completion of incomplete personal data, including by means of providing a supplementary (...) statement.
  
2. (...)<sup>26</sup>

---

<sup>24</sup> DE and UK scrutiny reservation.

<sup>25</sup> UK suggested to insert the qualification 'where reasonably practicable' UK also suggested inserting the qualification 'where necessary'.

<sup>26</sup> Deleted in view of the new Article 83.

***Right to be forgotten and to erasure***<sup>27</sup>

1. The (...) controller shall have the obligation to erase personal data without undue delay and the data subject shall have the right to obtain the erasure of personal data **concerning him or her** without undue delay where one of the following grounds applies:
  - (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

---

<sup>27</sup> DE, EE, PT, SE, SI, FI and UK scrutiny reservation. EE, FR, NL, RO and SE reservation on the applicability to the public sector. Whereas some Member States have welcomed the proposal to introduce a right to be forgotten (AT, EE, FR, IE); other delegations were more sceptical as to the feasibility of introducing a right which would go beyond the right to obtain from the controller the erasure of one's own personal data ( DE, DK, ES). The difficulties flowing from the household exception (UK), to apply such right to personal data posted on social media were highlighted (BE, DE, FR), but also the impossibility to apply such right to 'paper/offline' data was stressed (EE, LU, SI). Some delegations (DE, ES) also pointed to the possible externalities of such right when applied with fraudulent intent (e.g. when applying it to the financial sector). Several delegations referred to the challenge to make data subjects active in an online environment behave responsibly (DE, LU and UK) and queried whether the creation of such a right would not be counterproductive to the realisation of this challenge, by creating unreasonable expectations as to the possibilities of erasing data (DK, LU and UK). Some delegations thought that the right to be forgotten was rather an element of the right to privacy than part of data protection and should be balanced against the right to remember and access to information sources as part of the freedom of expression (DE, ES, LU, NL, SI, PT and UK). It was pointed out that the possibility for Member States to restrict the right to be forgotten under Article 21 where it interferes with the freedom of expression is not sufficient to allay all concerns in that regard as it would be difficult for controllers to make complex determinations about the balance with the freedom of expression, especially in view of the stiff sanctions provided in Article 79 (UK). In general several delegations (CZ, DE, FR) stressed the need for further examining the relationship between the right to be forgotten and other data protection rights. The Commission emphasised that its proposal was in no way meant to be a limitation of the freedom of expression. The inherent problems in enforcing such right in a globalised world outside the EU were cited as well as the possible consequences for the competitive position of EU companies linked thereto (BE, AT, LV, LU, NL, SE and SI).

- (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1) or point (a) of Article 9(2) and (...) there is no other legal ground for the processing of the data;
- (c) the data subject objects to the processing of personal data and has made a specific request to obtain erasure of the data pursuant to Article 19(1) and there are no overriding legitimate grounds for the processing or the data subject objects to the processing of personal data pursuant to Article 19(2);
- (d) the data have been unlawfully processed<sup>28</sup>;
- (e) the data have to be erased for compliance with a legal obligation to which the controller is subject<sup>29 30</sup>.

2. (...).

---

<sup>28</sup> UK scrutiny reservation: this was overly broad.

<sup>29</sup> RO scrutiny reservation.

<sup>30</sup> DE pointed to the difficulties in determining who is the controller in respect of data who are copied/made available by other controllers (e.g. a search engine) than the initial controller (e.g. a newspaper). AT opined that the exercise of the right to be forgotten would have take place in a gradual approach, first against the initial controller and subsequently against the 'secondary' controllers. ES referred to the problem of initial controllers that have disappeared and thought that in such cases the right to be forgotten could immediately be exercised against the 'secondary controllers' ES suggested adding in paragraph 2: 'Where the controller who permitted access to the personal data has disappeared, ceased to exist or cannot be contacted by the data subject for other reasons, the data subject shall have the right to have other data controllers delete any link to copies or replications thereof'. The Commission, however, replied that the right to be forgotten could not be exercised against journals exercising freedom of expression. According to the Commission, the indexation of personal data by search engines is a processing activity not protected by the freedom of expression.

2a. *Where the controller<sup>31</sup> (...) has made the personal data public<sup>32</sup> and is obliged pursuant to paragraph 1 to erase the data, the controller, taking account of available technology and the cost of implementation<sup>33</sup>, shall take (...) reasonable steps<sup>34</sup>, including technical measures, (...) to inform **known controllers**<sup>35</sup> which are processing the data, that a data subject requests them to erase any links to, or copy or replication of that personal data<sup>36</sup>.*

---

<sup>31</sup> BE, DE and SI queried whether this also covered controllers (e.g. a search engine) other than the initial controller (e.g. a newspaper).

<sup>32</sup> ES prefers referring to 'expressly or tacitly allowing third parties access to'. IE thought it would be more realistic to oblige controllers to erase personal data which are under their control, or reasonably accessible to them in the ordinary course of business, i.e. within the control of those with whom they have contractual and business relations. BE, supported by IE and LU, also remarked that the E-Commerce Directive should be taken into account (e.g. through a reference in a recital) and asked whether this proposed liability did not violate the exemption for information society services provided in that Directive (Article 12 of Directive 2000/31/EC of 8 June 2000), but COM replied there was no contradiction. LU pointed to a risk of obliging controllers in an online context to monitor all data traffic, which would be contrary to the principle of data minimization and in breach with the prohibition in Article 15 of the E-Commerce Directive to monitor transmitted information.

<sup>33</sup> Further to NL suggestion. This may hopefully also accommodate the DE concern that the reference to available technology could be read as implying an obligation to always use the latest technology;

<sup>34</sup> LU queried why the reference to all reasonable steps had not been inserted in paragraph 1 as well and SE, supported by DK, suggested clarifying it in a recital. COM replied that paragraph 1 expressed a results obligation whereas paragraph 2 was only an obligation to use one's best efforts. ES thought the term should rather be 'proportionate steps'. DE, ES and BG questioned the scope of this term. ES queried whether there was a duty on controllers to act proactively with a view to possible exercise of the right to be forgotten. DE warned against the 'chilling effect' such obligation might have on the exercise of the freedom of expression.

<sup>35</sup> BE, supported by ES and FR, suggested referring to 'known' controllers (or third parties).

<sup>36</sup> BE and ES queried whether this was also possible for the offline world and BE suggested to clearly distinguish the obligations of controllers between the online and offline world. Several Member States (CZ, DE, LU, NL, PL, PT, SE and SI) had doubts on the enforceability of this rule.

3. Paragraphs 1 and 2a shall not apply<sup>37</sup> to the extent that (...) processing of the personal data is necessary:
- a. for exercising the right of freedom of expression in accordance with Article 80<sup>38</sup>;
  - b. for reasons of public interest in the area of public health in accordance with Article **9(2)(g)(h) and (hb) as well as Article 9(4)**<sup>39</sup>;
  - c. for archiving purposes in the public interest or for scientific, statistical **and** historical (...) purposes in accordance with **Article 83**;
  - d. (...)
  - e. (...)
  - f. for the establishment, exercise or defence of legal claims.

---

<sup>37</sup> DE queried whether these exceptions also applied to the abstention from further dissemination of personal data. AT and DE pointed out that Article 6 contained an absolute obligation to erase data in the cases listed in that article and considered that it was therefore illogical to provide for exception in this paragraph.

<sup>38</sup> DE and EE asked why this exception had not been extended to individuals using their own freedom of expression (e.g. an individual blogger).

<sup>39</sup> DK queried whether this exception implied that a doctor could refuse to erase a patient's personal data notwithstanding an explicit request to that end from the latter. ES and DE indicated that this related to the more general question of how to resolve differences of view between the data subject and the data controller, especially in cases where the interests of third parties were at stake. PL asked what was the relation to Article 21.

4. Paragraphs 1 and 2a shall not apply when the processing of the personal data is necessary for compliance with a legal obligation to process the personal data pursuant to Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.
  
5. (...)

Preliminary the Austrian delegations would like to suggest the following amendments to Chapter III (Doc. 7084/15). The recitals have to be adapted accordingly. Provisions not mentioned in the following text are meant to be unchanged for the time being. Changes are in *bold, italic and underlined*.

## Article 12

### **Transparent information, communication and modalities for exercising the rights of the data subject**

1. The controller shall ~~take appropriate measures to~~ provide any information referred to in Articles 14 and 14a and any communication under Articles 15 to 19 and 32 relating to the processing of personal data to the data subject in *an easily accessible form and intelligible*, using clear and plain language *adapted to the data subject*. The information shall be provided in writing, ~~or where appropriate, electronically or by other means~~. *Where the data subject makes the request in electronic form, the information shall be provided in electronic form, unless otherwise requested by the data subject. When requested by the data subject the information may be given orally provided that the identity of the data subjects is proven.*
2. The controller shall provide the *information referred to in Articles 14a and 15 and* information on action taken on a request under Articles *15* to 19 to the data subject without undue delay and at the latest within one month of receipt of the request (...). This period may be extended for a further two months when necessary, taking into account the complexity of the request and the number of requests. Where the extended period applies, the data subject shall be informed within one month of receipt of the request of the reasons for the delay.

4. Information provided under Articles 14 and 14a (...) and any communication under Articles 16 to 19 and 32 shall be provided free of charge. Where requests from a data subject are *manifestly* unfounded or excessive, in particular because of their repetitive character, the controller (...) may refuse to act on the request. In that case, the controller shall bear the burden of demonstrating the *manifestly* unfounded or excessive character of the request. **The controller shall inform the data subject of the refusal and on the possibilities of lodging a complaint to the supervisory authority and seeking a judicial remedy.**

**Request of an additional recital for Art. 12 para 4a (identification of the data subject):**

**There should be no doubt about the fact that as a general rule a user when relying particularly on his/her right of access or deletion should not be required to provide the controller with more information about himself/herself that the latter already holds. Within the context of a request for access directed to a mail provider e.g. it should last that the user identifies himself/herself by its account (“user ID”) in combination with a password.**

## Article 14

### Information to be provided where the data are collected from the data subject

1. Where personal data relating to a data subject are collected from the data subject, the controller shall (...), at the time when personal data are obtained, provide the data subject with the following information:

- (a) the identity and the contact details of the controller and, if any, of the controller's representative; the controller **shall** also include the contact details of the data protection officer, if any;

**(c) the legal basis for which the personal data are intended;**

**(d) the existence of the right to request from the controller access to and rectification or erasure of the personal data or restriction of processing of personal data concerning the data subject and to object to the processing of such personal data (...)**

*(e) the right to lodge a complaint to a supervisory authority (...);*

1a. In addition to the information referred to in paragraph 1, the controller shall provide the data subject with such further information necessary to ensure fair and transparent processing in respect of the data subject, ~~having regard to the specific circumstances and context in which the personal data are processed such as:~~

*(a) the period for which the personal data will be stored, or if this is impossible, the criteria used to determine this period*

~~*(e) the existence of the right to request from the controller access to and rectification or erasure of the personal data or restriction of processing of personal data concerning the data subject and to object to the processing of such personal data (...);*~~

~~*(f) the right to lodge a complaint to a supervisory authority (...);*~~

5. Paragraphs 1, *1a and 1b* shall not apply where and insofar as the data subject already has the information.

#### Article 14a

**Information to be provided where the data have not been obtained from the data subject**

1. Where personal data have not been obtained from the data subject, the controller shall provide the data subject with the following information:

*(c) the legal basis for which the personal data are intended.*

*(d) the existence of the right to request from the controller access to and rectification or erasure of the personal data or restriction of processing of personal data concerning the data subject and to object to the processing of such personal data (...)*

*(e) the right to lodge a complaint to a supervisory authority (...);*

2. In addition to the information referred to in paragraph 1, the controller shall provide the data subject with such further information necessary to ensure fair and transparent processing in respect of the data subject, ~~having regard to the specific circumstances and context in which the personal data are processed such as:~~

~~(b) the period for which the personal data will be stored, or if this is impossible, the criteria used to determine this period~~

~~(e) the existence of the right to request from the controller access to and rectification or erasure of the personal data concerning the data subject and to object to the processing of such personal data (...);~~

~~(f) the right to lodge a complaint to a supervisory authority (...);~~

(g) the origin of the personal data, ~~unless the data originate from publicly accessible sources;~~

4. Paragraphs 1 to 3a shall not apply where and insofar as:

(b) the provision of such information (...) proves impossible or would involve a disproportionate effort ~~or is likely to render impossible or to seriously impair the achievement of the purposes of the processing; in such cases the controller shall take appropriate measures to protect the data subject's rights and freedoms and legitimate interests;~~ or

~~(d) where the data originate from publicly available sources; or~~

~~(e) where the data must remain confidential in accordance with a legal provision in Union or Member State law or because of the overriding legitimate interests of another person<sup>39</sup>.~~

## Article 15

### Right of access for the data subject

1. The data subject shall have the right to obtain from the controller at reasonable intervals and free of charge (...) confirmation as to whether or not personal data concerning him or her are being processed and where such personal data are being processed access to the data and the following information:

**(aO) the personal data undergoing processing**

(a) the purposes **and the legal basis** of the processing;

**(d) the period for which the personal data will be stored, or if this is impossible, the criteria used to determine this period**

**1b. ~~On request and without an excessive charge, The controller shall provide a copy of the personal data undergoing processing to the data subject. The information shall be given free of charge if it concerns the current data files of a use of data and if the person requesting information has not yet made a request for information to the same controller regarding the same application purpose in the current year. In all other cases a flat rate compensation may be charged; deviations are permitted to cover actually incurred higher expenses.~~**

**1c. Upon inquiry, the person requesting information has to cooperate in the information procedure to a reasonable extent to prevent an unwarranted and disproportionate effort on the part of the controller.**

2. Where personal data supplied by the data subject are processed by automated means **and in a structured and commonly used format**, the controller shall, on request and without an excessive charge, provide a copy of the data concerning the data subject **in a structured and commonly used format** to the data subject.

2a. The right to obtain a copy referred to in paragraphs **1b and** 2 shall not apply where such copy cannot be provided without disclosing personal data of other data subjects.

## Article 17

### Right to erasure

1. The (...) controller shall have the obligation to erase personal data without undue delay and the data subject shall have the right to obtain the erasure of personal data concerning him or her without undue delay where one of the following grounds applies:

- (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1) or point (a) of Article 9(2) and (...) there is no other legal ground for the processing of the data;

*The question here is whether this last sentence is linked to the notion of further processing. This has to be clarified in a recital.*

- (d) the data have been unlawfully processed;

*A recital has to clarify that not any infringement of the regulation leads to the right to erasure. For example in a situation where personal data are processed in accordance with Art. 6 (1) (c) and the controller doesn't inform the data subject in accordance with Art. 14 or 14a the right to erasure shall not apply.*

**2a. Where the controller (...) has made the personal data public and is obliged pursuant to paragraph 1 to erase the data, the controller, taking account of available technology and the cost of implementation, shall take (...) reasonable steps, including technical measures, (...) to inform known controllers which are processing the data, that a data subject requests them to erase any links to, or copy or replication of that personal data.**

3. Paragraphs 1 **and 2a** shall not apply to the extent that (...) processing of the personal data is necessary:

- ~~**(a) for exercising the right of freedom of expression in accordance with Article 80;**~~
- ~~**(d) for archiving purposes in the public interest or for scientific, statistical and historical (...) purposes in accordance with Article 83;**~~

**Article 17c**  
**Right to be forgotten**

**1. [A basic provisions has to be added implementing of ECJ Google judgment.]**

**2. Where the controller (...) has made the personal data public and is obliged pursuant to Article 17 paragraph 1 to erase the data, the controller, taking account of available technology and the cost of implementation, shall take (...) reasonable steps, including technical measures, (...) to inform ~~known~~ controllers which are processing the data, that a data subject requests them to erase any links to, or copy or replication of that personal data.**

**3. Paragraphs 1 and 2 shall not apply to the extent that (...) processing of the personal data is necessary:**

**(a) for exercising the right of freedom of expression in accordance with Article 80;**

*Further discussion and complementing recitals are essential and needed.*

**SECTION 4**  
**RIGHT TO OBJECT AND AUTOMATED DECISION MAKING**

**Article 20**  
**Automated decision making**

*The provision is closely linked to the definitions in Art. 4 and has to be read together. In any case we have to avoid the linkage between profiling and other instruments like data mining or big data.*

*Further discussion and complementing recitals on Article 20 are essential and needed.*

**CHAPTER VIII**  
**REMEDIES, LIABILITY AND SANCTIONS**

The further remark is limited to Art. 75. We will provide further comments in due course.

**Article 75**

**Right to a judicial remedy against a controller or processor**

Para 1 should read as follows:

*1. **Insofar as a supervisory authority cannot itself take a binding decision on a complaint,** a data subject shall have the right to an effective judicial remedy if they consider that their rights under this Regulation have been infringed as a result of the processing of their personal data in non-compliance with this Regulation.*

**Justification:**

This is intended to take account of cases where a Member State establishes its national supervisory authority in such a way that in certain exceptional circumstances it is unable to take any legally binding decisions for or against the interests of data subjects. This is the only instance in which there is any point in providing direct access to a court without the supervisory authority having to act first or issue a (non-binding) decision. However, where this does not apply, full parallelism between the legal protection afforded by the supervisory authorities and the courts is not logically conceivable.

Art. 22 of the Directive 95/46/EC has been understood that various possibilities for implementation are available to the Member States. A Member State may

- establish the data protection authority itself as a "court", or
- provide a court (with full knowledge of the facts) as an authority above the supervisory authority (judicial remedy)

or

- establish the supervisory authority as an ombudsman-like body which does not "decide". In that case only the court takes legally binding decisions and is especially not bound by the opinion of the supervisory authority.

However, the rules in the Directive have not been understood to require that a court also may decide a case where the supervisory authority has the power to take decisions. This would be illogical since it would cause an insolvable conflict between legal acts issued on one hand by the supervisory authority and on the other hand by the court seized.

Art. 75 of the Regulations is now creating the same problem if it has to be understood to offer the right to genuine choice between the different judicial remedies.

In our understanding we have to achieve the following solution:

- a) where a supervisory authority has the power to take binding decisions a court can only have the power to review the decision by the supervisory authority;
- b) where the supervisory authority deals with a case without having the power to take a binding decision the data subject is in fact free to choose whether to bring a court action immediately (instead of) or during or after the end of the proceedings before the supervisory authority.

Genuinely parallel proceedings have to be avoided.

## POLAND

Poland's comments on Chapters III (following the DAPIX meeting 23-24.03.2015: doc: 7084/15 DATAPROTECT 31 JAI 169 MI 159 DRS 23 DAPIX 39 FREMP 50 COMIX 114 CODEC 336).

Proposed changes to the text are marked in **bold**. The changes should be read together with our interventions during the DAPIX meeting of 23-24.03.2015.

### CHAPTER III

#### *Art.12 - Transparent information, communication and modalities for exercising the rights of the data subject*

Poland supports introduction of adjective “abusive” in Art. 12.4:

4. *Information provided under Articles 14 and 14a (...) and any communication under Articles 16 to 19 and 32 shall be provided free of charge. Where requests from a data subject are ~~abusive~~ **abusive** ~~manifestly unfounded or excessive~~, in particular because of their repetitive character, the controller (...) may refuse to act on the request. In that case, the controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.*

#### *Art. 14 - Information to be provided where the data are collected from the data subject*

- Poland would like to underline that overloading a data subject with information may lead to situation where information provided by a data controller would not be clear for him/her
- Poland supports new par. 1b (which makes the control of data subject over their data more effective).
- We believe that when a DPO is appointed, a data controller should be obliged to provide DPO's contact details at the time when personal data are obtained:

1. *Where personal data relating to a data subject are collected from the data subject, the controller shall (...), at the time when personal data are obtained, provide the data subject with the following information:*

*(a) the identity and the contact details of the controller and, if any, of the controller's representative; the controller ~~may~~ **shall** also include the contact details of the data protection officer, if any;*

*(...)*

- Poland believes that information duty should not apply when provision of information proves to be impossible or would involve a disproportionate effort. Such an approach is in line with Directive 95/46:

5. *Paragraphs 1, **1a and 1b** shall not apply where and insofar as:*

*(a) the data subject already has the information; or*

*(b) the provision of such information (...) proves impossible or would involve a disproportionate effort; in such case the controller shall take appropriate measures to protect the data subject's rights and freedoms.*

**Art. 14a - Information to be provided where the data have not been obtained from the data subject**

- **Footnote 33** – Poland withdraws the comment from footnote 33, as they were taken into consideration by the PRES.
- Poland **supports new par. 3a**, which makes control of data subjects over their data more effective.
- We believe that reference to “or to seriously impair the achievement of the purposes of the processing” in Art. 14a should be deleted, as data controller’s purposes should not override his/her information duty:

4. Paragraphs 1 to **3a** shall not apply where and insofar as:

- (a) *the data subject already has the information; or*
- (b) *the provision of such information (...) proves impossible or would involve a disproportionate effort or is likely to render impossible ~~or to seriously impair the achievement of the purposes of the processing~~; in such a cases the controller shall take appropriate measures to protect the data subject's **rights and freedoms and legitimate interests**; or*
- (c) *obtaining or disclosure is expressly laid down by Union or Member State law to which the controller is subject, which provides appropriate measures to protect the data subject's legitimate interests; or*
- (d) *where the data originate from publicly available sources; or*
- (e) *where the data must remain confidential in accordance with a legal provision in Union or Member State law or because of the overriding legitimate interests of another person.*

- **Footnote 39:** PL asks to be added (together with BE) to footnote 39 (the term „overriding legitimate interests of another person” is too broad and should be narrowed).

#### ***Art.15 - Right of access for the data subject***

- Par. 1 point (h) should be changed as follows:

*“in the case of automated decision making including profiling referred to in Article 20(1) and (3), information concerning (...) the processing as well as the significance and envisaged consequences of such processing”*

#### ***Art.17 - Right to be forgotten and to erasure***

- Poland would like to narrow the scope of Art. 17 par 2a, in order to make “right to be forgotten” possible to be implemented in practice. The initial proposal of the EC, from Polish perspective seems to be unrealistic:

2a. Where the controller (...) has made the personal data public and is obliged pursuant to paragraph 1 to erase the data, the controller, taking account of available technology and the cost of implementation, shall take (...) reasonable steps, including technical measures, (...) to inform known controllers to which he intentionally disclosed ~~which are processing~~ the data, that a data subject requests them to erase any links to, or copy or replication of that personal data.

- **Recital 53a:** Poland proposes the following wording:

*Inasmuch as the removal of links from the list of internet search results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information **as well as this right should be considered in relation to the fundamental right to freedom of expression**, a fair balance should be sought in particular between ~~that~~ interest in having access to that information, the right to freedom of expression provided in Article 11 of the Charter and the data subject's fundamental rights under Articles 7 and 8 of the Charter. ~~Whilst the data subject's rights protected by those articles should override, as a general rule, the interest of internet users,~~ That balance may in specific cases depend on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having access to that information, an interest which may vary, in particular, according to the role played by the data subject in public life.*

Comment: the right to erasure and the right to be forgotten cannot undermine the principle of freedom of expression which is also one of fundamental rights provided in the Charter, and these two rights (right to privacy and freedom of expression and information) should be treated equally.

- **Recital 54aa:** Poland proposes the following wording:

*54aa) However the right to be forgotten should be balanced with other fundamental rights. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. This may lead to the result that the personal data has to be maintained for exercising the right of freedom of expression, ~~when required by law~~, for archiving purposes in the public interest or for historical, statistical and scientific (...) purposes, for reasons of public interest in the area of public health or social protection, or for the establishment, exercise or defence of legal claims.*

Comment: Freedom of expression does not require a legal basis in order to be balanced with conflicting rights, therefore the passage “when required by law” in Recital 54aa has to be deleted.

***Art. 17b - Notification obligation regarding rectification or erasure***

- Poland supports the position of BE, ES, FR in the **footnote 77** on the need to limit the scope of this article to the "known recipients". At the same time, Poland points on the possible negative effects of informing all recipients ("each recipient") because in certain situations, this can have negative consequences for the data subjects (eg. giving additional information concerning the data subject, which recipient might had already forgotten) here, in this regard, we also support DE in **footnote 76**.

***Art. 20 - Decisions based on profiling***

- Decisions based on profiling should be allowed, but it must be carried out in a transparent and nondiscriminatory manner. A person who is subject to profiling should receive adequate information before profiling.
- It is also important to differentiate the situations when we deal with profiling, within a meaning of a form of automated processing, but when no decision which might produce legal effects or significantly affect the natural person is taken, from the situations when profiling is used to take decision which produces legal effects or significantly affects the natural person. In the first situation, the activity of automated processing or profiling itself should be allowed and be subject only to the general rules governing processing of personal data.
- At the same time, in **par. 1** the word “*solely*” should be deleted which would make the application of this provision too broad – each decision – making which is based not only, but – *inter alia* – on automated processing should be subject to requirements of this provision. In most cases, for example when the assessing of credit worthiness, the automated processing is only one, but non sole of the operations:

1. *The data subject shall have the right not to be subject to a decision evaluating personal aspects relating to him or her, which is based solely on automated processing, including profiling, and produces legal effects concerning him or her or significantly affects him or her.*

## **POLAND – COMMENTS ON CHAPTER VIII**

*Art. 74 - Right to an effective judicial remedy against a supervisory authority*

*Art. 75 - Right to a judicial remedy against a controller or processor*

- According to Poland, in principle, every judicial remedy should be “effective” by its definition, therefore Poland wonders whether there is a necessity to use the adjective “effective” in this context in Art. 74 and Art. 75.

*Art. 76 - Representation of data subjects*

- Poland is against empowering a body, organisation or association with a right to lodge a complaint independently. Bodies, organisations or associations referred to in par. 1 should, in case they gain knowledge about possible breach, inform relevant DPA, which in such situation is obliged to investigate the case ex officio. In such a case it is the role of a DPA to take action, if needed. Moreover, if a data subject wants to be represented by an organisation, he or she may issue a power of attorney authorising relevant body organisation or association to act on his or her behalf. Therefore, Poland is in favour of deletion of par. 1a.

*Art. 76a - Suspension of proceedings*

- In Poland’s opinion the proposed mechanism still needs to be further developed and clarified. In particular, it can be difficult to exchange information between courts of different Member States and coordinate their actions as well as to force national courts to suspend proceedings, when waiting for another national court’s ruling. Moreover, the provision does not regulate the situations when, for example, both national courts suspend their proceedings, stating that the other court is competent to issue ruling in a particular case.

- The explanation of the term "the same processing activities" is needed, in particular it is not clear whether this term refers to: (i) the cases that have the same scope; or (ii) the cases that are related. This issue should be clarified – there is a need of clarity in which situations the courts are obliged to exchange information about pending court proceedings.
- Also the relationship between Art. 76a and provisions of Regulation No 1215/2012 is not clear. Should Art. 76a be considered as *lex specialis* in relation to provisions of Regulation No 1215/2012 and to the extent not covered by the draft regulation the provisions of Regulation No 1215/2012 shall apply (i.e. the provisions contained in Section 9 of Regulation No 1215/2012)? If so, is Art. 76a of the draft Regulation equivalent to Art. 29 of Regulation 1215/2012, which refers to proceedings involving the same cause of action, or is it equivalent to Art. 30 of the Regulation 1215/2012, which refers to the related actions?

***Art. 77 - Right to compensation and liability***

- In **par. 3** Poland proposes to replace “*may*” with “*shall*” which will allow to clarify the exclusion of liability of data controllers and data processors (“*The controller or the processor ~~may~~ shall be exempted from this liability, in whole or in part, if the controller or the processor proves that they are not responsible for the event giving rise to the damage*”).

***art. 79 - General conditions for imposing administrative fines***

- **Par. 2a** - The conditions for imposing a fine or other measure, which are referred to in Art. 79 should in the future be clarified in the guidelines of the European Data Protection Board. Otherwise, there is a possibility of different interpretations of these provisions by national authorities and a forum shopping. Poland asks for deletion from footnote 143.
- Moreover, in par. 2a, the aggravating circumstances should be better distinguished from mitigating circumstances (for example in relation to adherence to codes of conduct or certification mechanisms which can be interpreted in both manner – as aggravating or mitigating factors).

**art. 79a - Administrative fines**

- In Poland's view this provision should be the most simple and clear. We need uniform application of administrative fines in the European Union.
- Poland wants **par. 3a** to be maintained – it clears doubts the controllers and processors might have in the case of accumulation of different violations, which is a good solution.

**art. 79b - Penalties**

According to Poland, criminal liability, which is the subject of this article, is within the competence of Member States, and should not be harmonised in the EU. Therefore, we preferred the previous wording of this provision, without "*For infringements of the provisions of this Regulation not listed in Article 79a*" should be deleted which will make the wording of this article more precise.

**WRITTEN COMMENTS AND PROPOSALS ON Chapters III and VIII**

**Article 17, Right to be forgotten**

3. Paragraphs 1 and 2a shall not apply to the extent that (...) processing of the personal data is necessary:

- a. for exercising the right of freedom of expression in accordance with Article 80;
- b. for compliance with a legal obligation **which requires processing of personal data** ~~to process the personal data~~ by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- c. for reasons of public interest in the area of public health in accordance with Article **9(2)(g)(h) and (hb) as well as Article 9(4)**;
- d. for archiving purposes in the public interest or for *scientific, statistical* **and** historical (...) purposes in accordance with **Article 83**;
- e. (...)
- f. (...)
- g. for the establishment, exercise or defence of legal claims.

Justification: Legislation quite rarely contains obligations to process personal data. Instead there are often obligations which require processing of personal data. An alternative approach would be to align Art. 17(3)(b) with the wording of Article 6(1)(c).

**Article 74, Right to an effective judicial remedy against a supervisory authority**

*Article 74 Right to an effective judicial remedy against a supervisory authority*

1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them. (...). **addressed to them or which is of direct and individual concern to them.**

Justification; current formulation “concerning them” is too wide. It should be clarified who are “concerned” in the meaning of Art. 74(1). The drafting proposal is based on Article 263(4) TFEU.

### **Article 79, General conditions for imposing administrative fines**

#### *Article 79 **General conditions for imposing administrative fines sanctions***

Justification: This Article should apply more generally when assessing the consequences of infringements and also take properly into account the possibility to issue reprimands.

~~1. Each supervisory authority [competent in accordance with Article 51] shall be empowered to impose administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in Article 79a. Administrative fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in Article 53.~~

Justification: This para is superfluous with Article 53(1b)(g). It has no added value in this Article. Deleting this para would make the text more simple and easier to read.

~~2. Administrative fines imposed pursuant to Article 79a shall in each individual case be effective, proportionate and dissuasive.~~

Justification: This para is not necessary, because para 2a gives more concrete content for “effective, proportionate and dissuasive”. In any case, it could be removed to after para 2a.

2a. When deciding whether to impose an administrative fine in addition to, or instead of, measures referred to in points (a) to (f) of paragraph 1b of Article 53 and deciding on the amount of the administrative fine in each individual case due regard shall be ~~had~~ **given** to the following:

- (a) the nature, gravity and duration of the infringement having regard to the nature scope or purpose of the processing concerned;
- (b) the intentional or negligent character of the infringement,
- (c) **the gravity of infringement having regard** the number of data subjects affected ~~by the infringement~~ and the level of damage suffered by them;

Justification: The weight should rather be on the act itself, not on the consequences of the act as the consequences might not be predictable.

- (d) action taken by the controller or processor to mitigate the damage suffered by data subjects;
- (e) the degree of responsibility of the controller or processor having regard to technical and organisational measures implemented by them pursuant to Articles 23 and 30;
- (f) any previous infringements by the controller or processor;

~~[(g) any financial benefits gained, or losses avoided, directly or indirectly from the infringement;]~~

- (h) the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;
- (i) **in case** measures referred to in point (b) and (c) of paragraph 1 and points (a), **(ca)**, (d), (e) and (f) of paragraph 1b of Article 53, **have previously been** ordered against the controller or processor concerned with regard to the same subject-matter, *compliance with **these measures*** ;

Justification: (ca) should be added to point (i).

- (j) adherence to approved codes of conduct pursuant to Article 38 or approved certification mechanisms pursuant to Article 39;
- (k) (...);
- (l) (...);
- (m) any other aggravating or mitigating factor applicable to the circumstances of the case.

2b. (...).

3. (...)

3a. (...)

**2 - 3(aa) Administrative fines imposed pursuant to Article 79a sanctions shall in each individual case be effective, proportionate and dissuasive. In a case of a minor infringement [or if the fines imposed would constitute an unreasonable burden to a natural person], a reprimand referred to in point (b) of paragraph 1b of article 53 shall be issued instead of fines. Due regard shall however be given to the intentional character of the infringement, to the previous infringements or any other factor referred to in paragraph 2a.**

*Justification:* If this para is kept, it should rather be placed here with the proposed amendments. This Article should apply more generally when assessing the consequences of infringements and also take properly into account the possibility to issue reprimands.

3b. Each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State.

4. The *exercise by the supervisory authority* [competent in accordance with Article 51] of its powers under this Article shall be subject to appropriate procedural safeguards in conformity with Union law and Member State law, including effective judicial remedy and due process.

#### **Article 79(a), Administrative fines**

##### *Article 79a*

##### ***Administrative fines***

1. The supervisory authority [competent in accordance with Article 51] may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] % of its total worldwide annual turnover of the preceding financial year, on a controller who, intentionally ~~or negligently~~:

- (a) does not respond within the period referred to in Article 12(2) to requests of the data subject;
- (b) charges a fee in violation of the first sentence of paragraph 4 of Article 12.

2. The supervisory authority [competent in accordance with Article 51] may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] % of its total worldwide annual (...) turnover of the preceding financial year, on a controller or processor who, intentionally ~~or negligently~~:

- (a) does not provide the information, or (...) provides incomplete information, or does not provide the information timely or in a ~~sufficiently~~ transparent manner, to the data subject pursuant to Articles 12(3), 14 and 14a;
- (b) does not provide access for the data subject or does not rectify personal data pursuant to Articles 15 and 16 or does not comply with the rights and obligations pursuant to Articles 17, 17a, 17b, 18 or 19;
- (c) (...);
- (d) (...);
- (e) does not ~~or not sufficiently~~ determine the respective responsibilities with joint controllers pursuant to Article 24; (f) does not ~~or not sufficiently~~ maintain the documentation pursuant to Article 28 and Article 31(4).
- (g) (...);

3. The supervisory authority [competent in accordance with Article 51] may impose a fine that shall not exceed [...] EUR or, in case of an undertaking, [...] % of its total worldwide annual turnover of the preceding financial year, on a controller or processor who, intentionally ~~or negligently~~:

- (a) processes personal data without a (...) legal basis for the processing or does not comply with the conditions for consent pursuant to Articles 6, 7, 8 and 9;
- (b) (...);
- (c) (...);
- (d) does not comply with the conditions in relation to (...) profiling pursuant to Article 20;
- (e) does not (...) implement appropriate measures or is not able to demonstrate compliance pursuant to Articles 22 (...) and 30;
- (f) does not designate a representative in violation of Article 25;
- (g) processes or instructs the processing of personal data in violation of (...) Articles 26;
- (h) does not alert on or notify a personal data breach or does not timely or completely notify the data breach to the supervisory authority or to the data subject in violation of Articles 31 and 32;
- (i) does not carry out a data protection impact assessment in violation of Article 33 or processes personal data without prior consultation of the supervisory authority in violation of Article 34(1);
- (j) (...);
- (k) misuses a data protection seal or mark in the meaning of Article 39 or does not comply with the conditions and procedures laid down in Articles 38a and 39a;

(l) carries out or instructs a data transfer to a recipient in a third country or an international organisation in violation of Articles 40 to 44;

(m) does not comply with an order or a temporary or definite ban on processing or the suspension of data flows by the supervisory authority pursuant to Article 53(1) or does not provide access in violation of Article 53(2).

(n) (...)

(o) (...).

[3a. If a controller or processor intentionally ~~or negligently~~ violates several provisions of this Regulation listed in paragraphs 1, 2 or 3, the total amount of the fine may not exceed the amount specified for the gravest violation.]

4. [The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of adjusting the maximum amounts of the administrative fines referred to in paragraphs 1, 2 and 3 to monetary developments, taking into account the criteria referred to in paragraph 2a of Article 79.]