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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)

- Preparation for a general approach: - Chapter III

Introduction

The Commission adopted on 25 January 2012 a comprehensive data protection package comprising of:

- abovementioned proposal for a General Data Protection Regulation, which is intended to replace the 1995 Data Protection Directive (former first pillar);

- a proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, which is intended to replace the 2008 Data Protection Framework Decision (former third pillar).

The aim of the General Data Protection Regulation is to enhance data protection rights of individuals and facilitate the free flow of personal data in the digital single market.

The European Parliament adopted first reading on the proposals for the data protection Regulation and Directive on 12 March 2014.

The Council gave priority on achieving progress on the General Data Protection Regulation finding agreement on several partial general approaches between June 2014 and March 2015¹.

In the context of the Presidency's aim to find agreement in the June Justice and Home Affairs Council on the regulation in its entirety, the Presidency submits to the Permanent Representatives Committee for endorsement a compromise text on Chapter III on Rights of the data subject². This compromise text is the result of intensive discussions in meetings of the Data Protection Working Party (DAPIX) and the Justice and Home Affairs Counsellors³.

¹ A first partial general approach (PGA) was reached on Chapters V (international transfers of data) in June 2014 with other PGAs on Chapter IV (obligations of companies) in October 2014, on the overarching question of the public sector and Chapter IX (Specific data protection situations) in December 2014 and on the One-stop-shop mechanism (Chapters VI and VII) in March 2015.

² The relevant articles are Article 4(12a), Articles 11 -21, recitals 46 - 58a.

³ Under Irish Presidency, DAPIX discussed Chapter III in its entirety at its meetings on 9-11, 24, 29-30 April and 13 -14 May 2013. Council and its preparatory bodies also examined specific issues of Chapter III. The Council conducted an orientation debate on Article 17 (right to be forgotten) in light of the Google case under Italian Presidency (13619/14) after discussions in DAPIX on the basis of 11289/1/14 REV 1 and 10187/14. DAPIX discussed Article 20 on profiling (10617/14) and Article 18 on data portability (10614/14) under Hellenic Presidency. Article 21 as well as the corresponding recital 59 were part of the partial general approach on the flexibility of the public sector that was reached in December 2014. The Latvian Presidency took up the examination of Chapter III at meetings of DAPIX on 23-24 (7084/15) and 30-31 March (7526/15) and of the Justice and Home Affairs Counsellors on 17 April 2015 (7651/15).

Presidency overall compromise suggestion for Chapter III

Council's preparatory bodies succeeded in converging views on many provisions of Chapter III. With a view to further balancing the compromise text that appears in annex, the Presidency has made several new suggestions for changes in light of the discussions by the JHA Counsellors (DAPIX) on 17 April 2015. These new suggestions compared to document 7651/15 are marked in **bold underlining** in annexed overall compromise text on Chapter III and the related definition of profiling in Chapter I.

This compromise text aims at finding a balance between, on the one hand, the data protection rights of the data subjects and, on the other hand, the obligations of data controllers to provide the necessary information and communication to the data subject about the personal data they process. Against this background, the balances struck on the following important issues of Chapter III are highlighted:

Right to erasure and "to be forgotten" (Article 17 and recitals 53, 53a, 54, 54a, 54aa)

The Presidency suggests to maintain in the title of Article 17 a reference to the "right to be forgotten". This reference is kept because it provides added value in relation to the combination of the right of the data subject to oblige the data controller to erase personal data and the right to object to processing such data. This added value lies in the obligation for the controller that made the personal data public to inform other controllers about the request for erasure. The Presidency considers that the current wording of paragraph (2a) frames the obligations of the controller that has made the personal data public in a workable manner while improving data protection of the data subject.

Right to data portability (Article 18 and recital 55)

The Presidency is of the view that Article 18 on the right to data portability in combination with recital (55) finds the right balance between the interests of the data subject, the controller and other data subjects. Article 18 emphasizes that the data subject is entitled to receive personal data concerning him or her that he or she has provided to a controller. As a result, the data subject benefits from obtaining this data in a format that he or she can transfer to another controller. The interests of the controllers are taken into account by providing that data portability only concerns data that is processed based on consent or a contract and by automated means and by stipulating that the right to data portability is without prejudice to intellectual property rights. Finally, rights of other data subjects are protected by specifying in the recital that, where the data portability concerns a set of personal data of more than one data subject, this right remains without prejudice to the protection provided by the regulation.

Automated individual decision making (Article 20 and recitals 58, 58a and Article 4(12a))

The Presidency considers that the compromise text on automated individual decision making reflects the views of the majority of delegations. On the basis of the compromise text, data subjects have the right not to be subject to a decision that is solely based on automated processing which produces legal effects concerning him or her or significantly affects him or her. One form of automated individual decision making is "profiling" which is defined in Article 4(12b) as: "any form of automated processing of personal data consisting of using those data to evaluate personal aspects to a natural person, in particular to analyse and predict aspects concerning performance at work, economic situation, health, personal preferences, or interests, reliability or behaviour, location or movements".

Conclusion

Subject to the understanding on the basis of which Council reached agreements on the partial general approaches⁴, the Committee is invited to endorse the Presidency compromise text on Chapter III as it appears in annex with a view to enabling the Justice and Home Affairs Council to adopt a General Approach on the entire General Data Protection Regulation on 15 June 2015.

⁴ The partial general approaches are based on the understanding that:

- nothing is agreed until everything is agreed and future changes to be made to the text of the provisionally agreed Articles to ensure the overall coherence of the Regulation are not excluded;
- such partial general approaches are without prejudice to any horizontal question; and
- such partial general approaches do not mandate the Presidency to engage in informal trilogues with the European Parliament on the text.

- 46) ⁵The principle of transparency requires that any information addressed to the public or to the data subject should be easily accessible and easy to understand, and that clear and plain language **and, additionally, where appropriate, visualisation** is used. This information could be provided also in electronic form, for example, when addressed to the public, through a website. This is in particular relevant where in situations, such as online advertising, the proliferation of actors and the technological complexity of practice makes it difficult for the data subject to know and understand if personal data relating to them are being collected, by whom and for what purpose. Given that children deserve specific protection, any information and communication, where processing is addressed (...) to a child, should be in such a clear and plain language that the child can easily understand.
- 47) Modalities should be provided for facilitating the data subject's exercise of their rights provided by this Regulation, including mechanisms to request, (...) in particular access to data, rectification, erasure and to exercise the right to object. Thus the controller should also provide means for requests to be made electronically, especially where personal data are processed by electronic means. The controller should be obliged to respond to requests of the data subject without undue delay and at the latest within a fixed deadline of one month and give reasons where the controller does not intend to comply with the data subject's request.

⁵ DE suggestion (8089/15) partly taken over.

However, if requests are manifestly unfounded **or excessive**⁶ such as when the data subject **unreasonably and**⁷ repetitiously requests information or where the data subject abuses its right to receive information for example by providing false or misleading information when making the request, the controller could⁸ refuse to act on the request.²

- 48) ¹⁰The principles of fair and transparent processing require that the data subject should be informed (...) of the existence of the processing operation and its purposes (...). The controller should provide the data subject with any further information necessary to guarantee fair and transparent processing. Furthermore the data subject should be informed about the existence of profiling, and the consequences of such profiling. Where the data are collected from the data subject, the data subject should also be informed whether they are obliged to provide the data and of the consequences, in cases they do not provide such data.

11

⁶ Cion suggestion. As in Article 12(4).

⁷ DE, supported by Cion, suggestion.

⁸ EL suggested to specify the terms "repetitiously" and "abuses".

⁹ PT suggested instead "may".

⁹ AT suggested to delete the last sentence as repetitiously requesting information must not as such be considered that the request is manifestly unfounded. Alternatively, AT suggested "However, if requests are manifestly unfounded such as when the data subject repetitiously requests information *despite complete and correct information or despite properly substantiated denial of information or well-founded restriction of information by the controller* or where the data subject abuses its right to receive information for example by providing false or misleading information when making the request, the controller could refuse to act on the request."

AT: scrutiny reservation on "abuses its right".

¹⁰ AT suggested "shall" instead of "should" throughout recital (48).

¹¹ DE made text suggestion for a new recital (48a) (8089/15).

- 49) The information in relation to the processing of personal data relating to the data subject should be given to them at the time of collection, or, where the data are not collected from the data subject, within a reasonable period, depending on the circumstances of the case. Where data can be legitimately disclosed to another recipient, the data subject should be informed when the data are first disclosed to the recipient. Where the controller intends to process the data for a purpose other than the one for which the data were collected the controller should¹² provide the data subject prior to that further processing with information on that other purpose and other necessary information¹³. Where the origin of the data could not be provided to the data subject because various sources have been used, the information should be provided in a general manner.
- 50) However, it is not necessary to impose this obligation where the data subject already possesses this information, or where the recording or disclosure of the data is expressly laid down by law, or where the provision of information to the data subject proves impossible or would involve disproportionate efforts. The latter could be particularly the case where processing is for historical, statistical or scientific (...) purposes; in this regard, the number of data subjects, the age of the data, and any appropriate safeguards adopted may be taken into consideration.

¹² AT suggested "shall" instead of "should".

¹³ NL suggested to insert "in an appropriate manner" with a view to alleviating concerns of business. IE considered this sentence burdensome, in particular in case the other purpose is compatible with the initial purpose.

- 51) A natural person should have the right of access to data which has been collected concerning him or her, and to exercise this right easily and at reasonable intervals, in order to be aware of and verify the lawfulness of the processing. *This includes the right for individuals to have access to their ¹⁴personal data concerning their health, for example the data in their medical records containing such information as diagnosis, examination results, assessments by treating physicians and any treatment or interventions provided.* Every data subject should therefore have the right to know and obtain communication in particular for what purposes the data are processed, where possible for what period, which recipients receive the data, what is the logic involved in any automatic data processing and what might be, at least when based on profiling, the consequences of such processing. This right should not adversely affect the rights and freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software. However, the result of these considerations should not be that all information is refused to the data subject. Where the controller processes a large quantity of information concerning the data subject, the controller may request that before the information is delivered the data subject specify to which information or to which processing activities the request relates.
- 52) The controller should use all reasonable measures to verify the identity of a data subject who requests access, in particular in the context of online services and online identifiers. (...) A controller should not retain personal data for the sole purpose of being able to react to potential requests.

¹⁴ FR suggested to insert "login data and to their".

53) A natural person should have the right to have personal data concerning them rectified and a 'right to be forgotten' where the retention of such data is not in compliance with this Regulation **or with Union or Member State law to which the controller is subject**¹⁵. In particular, data subjects should have the right that their personal data are erased and no longer processed, where the data are no longer necessary in relation to the purposes for which the data are collected or otherwise processed, where data subjects have withdrawn their consent for processing or where they object to the processing of personal data concerning them or where the processing of their personal data otherwise does not comply with this Regulation. This right is in particular relevant, when the data subject has given their consent as a child, when not being fully aware of the risks involved by the processing, and later wants to remove such personal data especially on the Internet¹⁶. **The data subject should be able to exercise this right notwithstanding the fact that he or she is no longer a child.** However, the further retention of the data should be **lawful allowed**¹⁷ where it is necessary for *exercising the right of freedom of expression and information, for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, for reasons of public interest in the area of public health, for archiving purposes in the public interest, for historical, statistical and scientific (...) purposes or for the establishment, exercise or defence of legal claims.*

¹⁵ DE suggestion.

¹⁶ Inspired by FR suggestion, supported by HU, SI, to strengthen the rights of children as follows: This right should be exercised notwithstanding the fact that the data subject is no longer a child.

¹⁷ DE suggestion.

~~53a)¹⁸ Inasmuch as the removal of links from the list of internet search results could, depending on the information at issue, have effects upon the right to freedom of expression and information, Member States should, when reconciling the right to the protection of personal data with the right to freedom of expression and information, provide that¹⁹ a fair balance should be sought in particular between that fundamental right and the data subject's fundamental rights under Articles 7 and 8 of the Charter. (...)²⁰~~

54) To strengthen the 'right to be forgotten' in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform the known controllers²¹ who are processing such data that a data subject requests them to erase any links to, or copies or replications of that personal data. A known controller is a controller whose identity was known to the controller that made the personal data public at the time it was made public. It should also only extend to controllers which fall into that category who were deliberately and intentionally provided with the data by the controller which made the data public²².

¹⁸ NL considered that recital (53a) could be deleted as it is covered by recital (54a).

PL made a suggestion for an alternative text of recital (53a) (7586/15 REV1).

¹⁹ IE suggested to delete "Member States should ... provide that".

²⁰ UK considered that the balance should be made in the individual case and not horizontally; the recital could therefore be deleted. ES and DE thought that the part from the Google case should be deleted. DE was opposed to setting out that the data subjects' rights as a *general rule* should prevail and therefore wanted to delete the second sentence. CZ doubted the need of the recital (the second sentence needed redrafting). COM said that the Google case should not be codified in the Regulation and wanted to delete the paragraph.

PL made suggestion (8989/15).

²¹ PL and UK found that as regards *known controller* the text should be drafted tighter.

HU preferred to delete *known*.

AT, DE: reservation considering "known" too narrow given the dynamism of the digital world. DE suggested to delete "known".

Cion wanted "known" to be deleted.

²² UK suggestion supported by FR.

DE suggested to delete the sentences "A known ... data public".

To ensure the above²³ mentioned information, the controller should take (...) reasonable steps, taking into account available technology and the means available to the controller, including technical measures, in relation to data for the publication of which the controller is responsible. (...).

54a) Methods to restrict processing of personal data could include, inter alia, temporarily moving the selected data to another processing system or making the selected data unavailable to users or temporarily removing published data from a website. In automated filing systems the restriction of processing of personal data should in principle be ensured by technical means; the fact that the processing of personal data is restricted should be indicated in the system in such a way that it is clear that the processing of the personal data is restricted. ²⁴

54aa)²⁵ However the "right to be forgotten" should be balanced with other fundamental rights. Subject to the principle of proportionality, limitations **should may**²⁶ be made only²⁷ if they are necessary and genuinely meet objectives of general interest recognised by the Union **or a Member State**²⁸ or the need to protect the rights and freedoms of others. This **should may**²⁹ lead to the result that³⁰ the personal data has to be maintained *for exercising the right of freedom of expression 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*³¹, or for the establishment, exercise or defence of legal claims.

²³ DE suggested "the above" instead of "this".

²⁴ HR wanted to make a reference to cyber bullying.

²⁵ This part is moved from the last part of recital 53.

CZ and UK did not approve the drafting of recital 54aa

Cion suggested to delete recital (54aa) because all criteria for erasure are laid down in Article 17. Furthermore, the first part overlaps with recital (53) and the second part with recital (59).

FR: scrutiny reservation.

²⁶ FR suggestion.

²⁷ PL suggested to delete "only" and insert "in particular", delete "are necessary and genuinely".

²⁸ PL suggestion.

²⁹ FR suggestion.

³⁰ PL suggested: instead "As a result"

³¹ PL suggested to delete "or social protection".

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.

- 55) To further strengthen the control over their own data (...), where the processing of personal data is carried out by automated means, the data subject should also be allowed to **withdraw and receive** the personal data concerning him or her and any other relevant information³², which he or she has provided to a controller, in a structured and commonly used and machine-readable format and transmit it to another controller.

This right should apply where the data subject provided the personal data based on his or her consent or in the performance of a contract. It should not apply where processing is based on another legal ground other than consent or contract. By its very nature this right should not be exercised against controllers processing data in the exercise of their public duties. It should therefore in particular not apply where processing of the personal data is necessary for compliance with a legal obligation to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of an official authority duty vested in the controller.

³² DE suggestion.

Where, in a certain set of personal data, more than one data subject is concerned, the right to transmit the data should be without prejudice to the requirements on the lawfulness of the processing of personal data related to another data subject in accordance with this Regulation. ³³This right should also not prejudice the right of the data subject to obtain the erasure of personal data and the limitations of that right as set out in this Regulation and should in particular not imply the erasure of personal data concerning the data subject which have been provided by him or her for the performance of a contract, to the extent and as long as the data are necessary for the performance of that contract. (...)

- 56) In cases where personal data might lawfully be processed (...) on grounds of (...) the legitimate interests of a controller, any data subject should nevertheless be entitled to object to the processing of any data relating to them. It should be for the controller to demonstrate that their legitimate interests may override the interests or the fundamental rights and freedoms of the data subject.
- 57) Where personal data are processed for the purposes of direct marketing, the data subject should have the right to object to such processing free of charge and in a manner that can be easily and effectively invoked.

³³ FR suggested to delete the first sentence of this subparagraph. In reaction, Pres explained that recital 55 was narrower than right to access because it concerned right to data portability.

58) The data subject should 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, which produces legal effects concerning him or her or significantly affects him or her, like automatic refusal of an on-line credit application or e-recruiting practices without any human intervention. Such processing includes also 'profiling' consisting in any form of automated processing of personal data evaluating personal aspects relating to a natural person, in particular to analyse or predict aspects concerning performance at work, economic situation, health, personal preferences, or interests, reliability or behaviour, location or movements as long as it produces legal effects concerning him or her or significantly affects him or her³⁴; in particular to analyse or predict aspects concerning performance at work, economic situation, health, personal preferences, or interests, reliability or behaviour, location or movements. However, decision making based on such processing, including profiling, should be allowed when authorised³⁵ by Union or Member State law to which the controller is subject, including for fraud and tax evasion monitoring and prevention purposes and to ensure the security and reliability of a service provided by the controller, or necessary for the entering or performance of a contract between the data subject and a controller, or when the data subject has given his or her explicit consent. In any case, such processing should be subject to suitable safeguards, including specific information of the data subject and the right to obtain human intervention, to express his or her point of view, to get an explanation of the decision reached after such assessment and the right to contest the decision. In order 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, the controller **should** use adequate mathematical or statistical procedures for the profiling, implement technical and organisational measures appropriate to ensure that factors which result in data inaccuracies are corrected and the risk of errors is minimized, secure personal data in a way which takes account of the potential threats involved for the interests and rights of the data subject³⁶. Automated decision making and profiling based on special categories of personal data should only be allowed under specific conditions.

³⁴ UK suggested to insert "in an adverse manner". In reaction, Cion indicated this would lower data protection standards.

AT reservation on "as long as it produces legal effects concerning him or her or significantly affects him or her".

³⁵ BE suggested adding ' or recommended', with regard to e.g. ECB recommendations.

³⁶ Further to DE proposal. IE expressed doubts about the before last sentence.

58a) ~~The creation and the use of Profiling a profile³⁷, i.e. a set of data characterising a category of individuals that is applied or intended to be applied to a natural person~~ as such is subject to the (general) rules of this Regulation governing processing of personal data (legal grounds of processing, data protection principles etc.) with specific safeguards (for instance the obligation to conduct an impact assessment in some cases or provisions concerning specific information to be provided to the concerned individual). The European Data Protection Board should have the possibility to issue guidance in this context.

38

Article 4

Definitions

(12a) 'Profiling' means any form of automated processing of personal data consisting of using those data to evaluate personal aspects to a natural person, in particular to analyse and predict aspects concerning performance at work, economic situation, health, personal preferences, or interests, reliability or behaviour, location or movements;³⁹

(12b) (...);

³⁷ FR suggested to delete any reference to "profiles" given that the Regulation does not include a definition of "profile".

³⁸ DE suggested in recital (59) to delete "public" in "...the keeping of public registers".

³⁹ SI wanted the definition laid down in Article 15 of directive 95/46/EC.

AT rejected the definition suggesting to use throughout the text the term "automated processing of personal data" in combination with "decision making" or taking of measures" based thereon. In reaction, Cion indicated this term was broader than profiling.

CHAPTER III
RIGHTS OF THE DATA SUBJECT⁴⁰

SECTION 1
TRANSPARENCY AND MODALITIES

Article 11

Transparent information and communication

1. (...)
2. (...)

⁴⁰ General scrutiny reservation by UK on the articles in this Chapter.

Article 12

Transparent information, communication and modalities for exercising the rights of the data subject⁴¹

1. The controller shall take appropriate measures⁴² 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 intelligible and easily accessible form, using clear and plain language⁴³. The information shall be provided in writing, ~~or where appropriate, electronically~~⁴⁴ or by other⁴⁵ means, where appropriate electronically⁴⁶. Where the data subject makes the request in electronic form, the information shall may as a rule be provided in electronic form, unless otherwise requested by the data subject. When requested by the data subject, the information may⁴⁷ be given orally provided that the identity of the data subject subjects is proven.^{48 49 50 51}

⁴¹ DE, SE, SI and FI scrutiny reservation.

⁴² AT, supported by MT, PL, suggested to delete the text *take appropriate measures*, in contrast DE and NL liked to keep this phrase.

⁴³ AT suggested adding : "and adapted to the data subject".

⁴⁴ SE did not see any added value in *or where appropriate, electronically*, in contrast to CZ and PL, which wanted to keep this phrase.

⁴⁵ SI suggested to insert "demonstrable".

⁴⁶ AT meant that the information could be provided orally as long as the data subject agreed to that. COM found that idea sympathetic as long as the data subject was content and that it was not for the data subject to decide what form to use.

AT made a suggestion for the second sentence of paragraph 1 (7586/15 REV1)

IE was not convinced that data subjects under all circumstances could receive information in paper form.

⁴⁷ NL, supported by SK, suggested "must" instead of "may".

NL further considered that the phrase "providedproven" is already covered by paragraph 4a.

⁴⁸ UK suggested that the paragraph could also refer to machine readable information.

⁴⁹ IE opposed obliging the data controller to provide personal data in paper form in all cases as this could be burdensome and costly.

⁵⁰ DE suggested to add at the end "if this does not involve a disproportionate effort".

⁵¹ DK, supported by FI, suggested to delete the last two sentences of the paragraph considering these too detailed and, because they do not take into account that electronic information sometimes cannot be provided for instance for security reasons or because the controller does not have that information in electronic form. In reaction, Cion, supported by DE and FI, suggested "may as a rule".

DE suggested to insert at the end "if this does not involve a disproportionate effort".

- 1a. The controller shall facilitate⁵² the exercise of data subject rights under Articles 15 to 19⁵³. (...) In cases referred to in Article 10 (2) rights of the data subject can never be denied by the controller unless he **makes plausible that he is not in a position demonstrates the impossibility to identify** the data subject.⁵⁴
2. The controller shall provide (...) information on action taken on a request under Articles 15 and 16 to 19 to the data subject⁵⁵ without undue delay and at the latest within one month⁵⁶ 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.
3. If the controller does not take action on the request of the data subject, the controller shall inform the data subject without undue delay and at the latest within one month of receipt of the request of the reasons for not taking action and on the possibility of lodging a complaint to a supervisory authority (...).

⁵² CZ suggested instead: "The controller shall not make any obstacles to..."

⁵³ SI, CZ and UK thought this paragraph should be deleted.

⁵⁴ DK, IE, FI, NL, SK, UK strongly opposed the addition of this phrase suggested by FR. These delegations considered this addition unnecessary, given that Article 10(2) presupposes that the controller is not in a position to identify the data subject, and because it is impossible to prove the impossibility to identify the data subject. PL scrutiny reservation on relation between the last sentence of paragraph 1a and Article 10(2).

AT scrutiny reservation. AT pointed to the relation with Article 12(4a).

⁵⁵ DK suggested instead: "... information referred to in Article 15 and information on action taken on a request under Articles 16 to 19 to the data subject...". In reaction, Cion indicated not to see the added value of such a split.

⁵⁶ FR suggested a two months' period. UK said that the 1995 Directive uses '*without excessive delay*' and suggested to use it here too. NL supported FR and UK to extend the deadline. CZ, SI, UK pleaded in favour of deleting the one-month period. BG and PT thought it more simple to revert to the requirement of '*without excessive delay*' under the 1995 Data Protection Directive. SI suggested to say 'in accordance with law' because the MS have general rules on deadlines. BE was opposed to the one month deadline but thought it necessary to set out a fixed deadline. SK wanted a fixed deadline with flexibility of one month. ES and Cion said that a deadline was necessary, ES supporting a one month deadline.

4. Information provided under Articles 14 and 14a (...) ⁵⁷ and any communication under Articles 16 to 19 and 32 shall be provided free of charge ⁵⁸. Where requests from a data subject are *manifestly unfounded* ⁵⁹ or excessive ⁶⁰, in particular because of their repetitive character ⁶¹, the controller (...) may refuse to act on ⁶² the request. In that case, the controller shall bear the burden of demonstrating the *manifestly unfounded* or excessive character of the request.

4a. ⁶³Without prejudice to Article 10, where the controller has reasonable doubts concerning the identity ⁶⁴ of the individual making the request referred to in Articles 15 to 19, the controller may request the provision of additional information necessary to confirm the identity of the data subject.

5. (...)

6. (...)

⁵⁷ UK wanted to see the reinsertion of a reference to Article 15.

⁵⁸ SE thought that since information in Article 14 was to be provided by the data subject it did not fit in the context to talk about free of charge.

⁵⁹ DE, supported by BE, ES, HU and PL suggested to say *abusive* instead of manifestly unfounded. Also DE preferred "abusive". SI thought that *abusive* could be used in a recital. IE, AT, NL, DK, UK, PT, NO, RO, HR, EL, SI, CY, FI, CZ, LT, SE, SK, MT supported the term "manifestly unfounded".

⁶⁰ PL, supported by SE, thought that the criterion of 'manifestly excessive' required further clarification, e.g. through an additional recital. CZ found the wording complex and suggested to grant the data subject the right to request information every 6 months.

⁶¹ AT suggested to delete "in particular of their repetitive character".

⁶² NL scrutiny reservation: avoid that this gives the impression that public authority cannot refuse to consider requests by citizens.

⁶³ AT suggested a recital on identification of the data subject (7586/15 REV1)

⁶⁴ BE, supported by SI, suggested to replace *identity* with *authentication*.

Article 13
Rights in relation to recipients⁶⁵

(...)

SECTION 2
INFORMATION AND ACCESS TO DATA

⁶⁵ FR suggested a new Article 13a on standardised information policies, or, alternatively a recital, with the following wording: 'In order to ensure that the information to be provided to the data subjects according to this Regulation will be presented in an easily visible and clearly legible way and will appear in a language easily understood by the data subjects concerned, the European Data Protection Board shall issue guidelines to further specify the requirements for specific categories of processing or specific data processing sectors, including by issuing aligned tabular, using text and symbols or pictographs.' that is inspired by a suggestion by the EP.

Article 14

Information to be provided where the data are collected from the data subject⁶⁶

1. Where personal data relating to a data subject are collected from the data subject, the controller shall (...), at the time⁶⁷ 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 shall⁶⁸ 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 (...) **as well as the legal basis of the processing**⁶⁹.

⁶⁶ DE, 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. DE found the EP idea of providing information in the form of symbols was an interesting idea which facilitates the provision of information. SE found it peculiar that for example a court would be obliged to provide separate information to the data subject about a case that the data subject had initiated; such obligations are set out in the code on procedure.

⁶⁷ UK, supported by CZ, suggested to have instead: "as soon as / where practicable,". In reaction, Cion indicated that this would lower the level of data protection compared to the Directive 95/46/EC.

⁶⁸ NL, supported by IE, proposed "may" instead of "shall" arguing that the data protection officer is part of the data controller and, therefore, should not be referred to separately. In reaction, Cion pointed to the partial general approach on Article 35 which does not provide for an obligation to appoint a data protection officer. For that reason having "shall in point (1)(a) does not add to administrative burden. Moreover, it is important that the data protection officer is known because he acts as contact point for the data subject. Related provision in Article 14 a(1)(a).

⁶⁹ Suggestion of AT, HU, PL, SK.

- 1a. In addition to the information referred to in paragraph 1, the controller shall⁷⁰ at the time when personal data are obtained,⁷¹ provide the data subject with such further information⁷² necessary to ensure fair and transparent processing (...)⁷³, having regard to the specific circumstances and context in which the personal data are processed^{74,75}:
- (a) (...);⁷⁶
 - (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;
 - (c) the recipients or categories of recipients of the personal data⁷⁷;

⁷⁰ DE, EE, and PL asked to insert "on request". BE suggested to replace *shall* with *may*. 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. NL, supported by CY, EE and CZ, suggested therefore to add 'where appropriate' after *shall*. 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. DE, supported by IT, suggested to insert 'at the time when the personal data was obtained'. In contrast, IT thought that it was not necessary to provide the information at the same time.

⁷¹ DE suggestion supported by Cion and PL.

⁷² CZ suggested adding the word 'obviously'.

⁷³ Deleted at the suggestion of FR. AT, BE, opposed by Cion, wanted to delete the end of the sentence from 'having regard ...'

⁷⁴ COM reservation, supported by ES, on deletion of the words 'such as'. AT preferred the COM proposal because in particular the new paragraph 1a was drafted in a too open and vague manner, therefore the NL suggestion to add *where appropriate* went in the wrong direction. IT was against reducing the safeguards and considered the text as the bare minimum.

⁷⁵ CZ, supported by Cion, suggested to insert again the reference to the data subject.

⁷⁶ BE, supported by FR, HU, IT, PL, wanted either to reintroduce the text of Article 14(1)(c) on storage period or add as the EP has done *the criteria used to determine the period*. Cion also supported the reinsertion on text on a storage period.

⁷⁷ AT and DE thought that this concept was too vague (does it e.g. encompass employees of the data controller?).

- (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 (...) as well as the right to data portability ⁷⁸;
- (ea) where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2) ⁷⁹, the existence of the right to withdraw consent ⁸⁰ at any time ⁸¹, without affecting the lawfulness of processing based on consent before its withdrawal;
- (f) the right to lodge a complaint to a supervisory authority (...) ⁸²;
- (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 ⁸³;

⁷⁸ BE suggestion, supported by COM. The reference to direct marketing was deleted in view of comments by DK, FR, IT and SE. IT said that the information in paragraphs (e) and (f) were set out in Article 8 of the Charter and always had to be provided and therefore needed to be included in paragraph 1.

⁷⁹ DE suggested to delete "or point (a) of Article 9(2)".

⁸⁰ DE suggested to insert "pursuant to Article 7(4)."

⁸¹ DE suggested to insert a reference to Article 7(3).

⁸² IT said that the information in paragraphs (e) and (f) were set out in Article 8 of the Charter and always had to be provided and therefore needed to be included in paragraph 1.

⁸³ CZ, DE, ES and NL reservation. NL asked if it was mandatory to provide the information if the processing was based on a legal obligation.

(h) ⁸⁴the existence of automated decision making including profiling referred to in Article 20(1) and (3) and⁸⁵ information concerning (...) the logic involved in any automated data processing⁸⁶, as well as the significance and the envisaged consequences of such processing for the data subject. ⁸⁷

1b. Where the controller intends to further process the data (...) for a purpose other 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.^{88 89}

2. (...) ⁹⁰

⁸⁴ PL suggested: "where applicable, information about the existence of profiling referred to in Article 4(12a) and/or about automated decision making referred to in Article 20(1) and (3) and information concerning....".

⁸⁵ PL suggested instead "and/or".

⁸⁶ DE suggestion, supported by Cion.

IE, SE considered the phrase "the logic ...processing" unnecessary because already covered by Article 15(1)(h).

AT pointed out need to make terms consistent in this paragraph and Articles 14a(2) and Article 15(1)(h).

⁸⁷ SE and IE scrutiny reservation. IT meant that there were problems with this paragraph if the current text of Article 20 was maintained. DK suggested to delete this point considering it too burdensome.

⁸⁸ UK suggested to delete this paragraph.

NL said that business was worried how this provision would be interpreted if it becomes an obligation. AT meant that the paragraph was relevant and important. FR, IT, PL, RO, NO and COM supported paragraph (1b).

⁸⁹ BE, PL pointed out that Article 14(1b) and Article 14a(3a) should use consistent wording. DE made a suggestion (8089/15/).

Cion opposed the DE / DK suggestion under reference to Article 21 which allows Member States to restrict of the obligations and rights in inter alia Article 14 and 14a. Moreover, Directive 95/46/EC does not provide for such restrictions and therefore the DE / DK suggestions would lower the level of data protection.

DK considered the wording of the paragraph less clear now that the reference to Article 6(4) has been deleted and wanted to await the outcome of the horizontal discussion on further processing. DE, supported by FR, pointed out that it understood the paragraph to concern both compatible and incompatible purposes given that that the reference to Article 6(4) which refers to incompatible purposes only was deleted.

⁹⁰ HU and AT reservation on the deletion of this paragraph.

DE made a suggestion (8089/15)

3. (...)
4. (...)
5. Paragraphs 1, 1a and 1b⁹¹ shall not apply where and insofar as the data subject already has the information⁹²,

93

6. (...)
7. (...)
8. (...)

⁹¹ Suggestion by CZ, DK, NL, SE and NO.

ES considered that the reference to paragraph 1b could be deleted.

⁹² SE, supported by CZ, thought that it was necessary to insert more exceptions to the obligation to provide information SE mentioned such as illness or a fire. COM cautioned against limiting Article 14 too much. SE further considered that a similar provision to the one in Article 14a(4)(c) should be added. SE noted that recital 50 did not make a difference between the situations in Article 14 and 14a. Article 21 on restrictions would be difficult to use to create exceptions considered SE.

PL made a suggestion (8295/15).

⁹³ DE suggested to make Article 14(5) consistent with Article 14a(4) (8089/15)

Article 14 a

Information to be provided where the data have not been obtained from the data subject⁹⁴

1. Where personal data have not been obtained from the data subject, the controller shall provide the data subject with the following information^{95 96}:
 - (a) the identity and the contact details of the controller and, if any, of the controller's representative; the controller shall⁹⁷ 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 **as well as the legal basis of the processing⁹⁸**.

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, ⁹⁹having regard to the specific circumstances and context¹⁰⁰ in which the personal data are processed (...)¹⁰¹:
 - (a) the categories of personal data concerned;

⁹⁴ DE, EE, ES, AT, PT scrutiny reservation.

⁹⁵ DE suggested to add: "at the time when personal data are processed for the first time.

⁹⁶ RO wanted to add that this information should be provided once per year.

⁹⁷ NL, supported by IE, proposed "may" instead of "shall" arguing that the data protection officer is part of the data controller and, therefore, should not be referred to separately.

⁹⁸ Suggestion of HU, AT, PL and SK.

PL also suggested a new point: "the origin of the personal data, unless the data originate from publicly accessible sources".

⁹⁹ BE suggested to delete the end of the sentence from '*having regard to ...*'

¹⁰⁰ IT and FR doubts on the addition of the words 'and context'.

¹⁰¹ DE suggested to add: "at the time when personal data are processed for the first time".

- (b) (...) ¹⁰²
- (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;
- (d) the recipients or categories of recipients of the personal data;
- (da) **where applicable, that the controller intends to transfer personal data to a recipient in a third country or international organisation;** ¹⁰³
- (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** ¹⁰⁴ concerning the data subject and to object to the processing of such personal data as well as the right to data portability (...);
- (ea) where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), 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) ¹⁰⁵ **from which source** the ~~origin of the~~ personal data originate, unless the data originate from publicly accessible sources ^{106; 107}

¹⁰² BE, IT, FR, HU, PL, supported by Cion, wanted, as in Article 14(1a), a text on storage period or add as the EP has done *the criteria used to determine the period*.

¹⁰³ Suggestion of FR, supported by PL and Cion.

¹⁰⁴ Suggestion of SE.

¹⁰⁵ Suggestion of DE. PL suggested to move this point to paragraph 1.

¹⁰⁶ COM and AT scrutiny reservation. BE, supported by AT, ES and SE, suggested to delete paragraph (g). IT suggested to delete the phrase: "unless.... sources".

¹⁰⁷ Cion reservation (in line with position on the deletion of paragraph 4(d)). PL suggested to move point (g) to paragraph 1.

(h) ¹⁰⁸the existence of automated decision making including profiling referred to in Article 20(1) and (3) and¹⁰⁹ information concerning the logic involved in ~~any automated data processing~~¹¹⁰, as well as the significance and the envisaged consequences of such processing for the data subject.¹¹¹

3. The controller shall provide the information referred to in paragraphs 1 and 2:

- (a) within a reasonable period after obtaining the data, but at the latest within one month¹¹², 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.

3a Where the controller intends to **further** ¹¹³process the data (...) for a purpose other than the one for which the data were obtained¹¹⁴, 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 2.¹¹⁵¹¹⁶

¹⁰⁸ PL suggested to insert the same text as suggested in Article 14(1a).

¹⁰⁹ PL suggested instead "and/or".

¹¹⁰ Suggestion of DE, supported by Cion.

IE, SE considered the phrase "the logic ...processing" unnecessary because already covered by Article 15(1)(h).

AT pointed out the need to make terms consistent between this paragraph and Articles 14a(2) and Article 15(1)(h).

¹¹¹ DK suggested to delete this point considering it too burdensome.

¹¹² CZ reservation on one month fixed period.

¹¹³ BE, PL pointed out that Article 14(1b) and Article 14a(3a) should use consistent wording.

DE, FI, PL queried what "purpose other" meant.

¹¹⁴ CZ scrutiny reservation on concept of obtaining data.

¹¹⁵ IT meant that paragraph 3a represented the bare minimum of protection. AT support of the paragraph. UK meant that it should be used taking into account proportionality and practicability.

DK, FI considered the wording of the paragraph less clear now that the reference to Article 6(4) has been deleted. DK would await the outcome of the horizontal discussion on further processing.

¹¹⁶ DE made a text suggestion (8089/15).

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 ¹¹⁷or is likely to render impossible or to seriously impair the achievement of the purposes of the processing¹¹⁸; in such cases the controller shall take appropriate measures to protect the *data subject's* rights and freedoms and legitimate interests¹¹⁹; 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 interests¹²⁰; or
 - (d) (...) ¹²¹;

¹¹⁷ FR and AT asked what the words *or is likely ... purposes of the processing* were supposed to mean. COM wanted to delete that part of the paragraph. CZ wanted to keep the text in order to avoid fraud. COM noted that it was important to avoid fraud but considered that Article 21 gave the necessary flexibility for that.

¹¹⁸ ES, FR preferred to delete the phrase " or is likely ... processing .
COM scrutiny reservation.

¹¹⁹ Several delegations (DK, FI, PL, SI, 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.

¹²⁰ UK thought the requirement of a legal obligation was enough and no further appropriate measures should be required.

¹²¹ The phrase "where the data originate from publicly accessible resources, or" was deleted at the request of a large number of delegations. DE, CZ, SE and UK emphasised the importance of this exception given the quantity of data published on the internet. In reaction Cion indicated that re-instating this phrase would bring the risk of profiling without the subject knowing.

- (e) where the data must remain confidential in accordance with a legal provision in Union or Member State law (...)¹²² ¹²³ ~~124~~

125

5. (...)

6. (...)

¹²² COM and AT reservation on (d) and (e). UK referred to the existence of case law regarding privilege (confidentiality). BE, supported by PL, thought the reference to the overriding interests of another person was too broad.

¹²³ IT said that the information in paragraphs (e) and (f) were set out in Article 8 of the Charter and always had to be provided and therefore needed to be included in paragraph 1.

¹²⁴ CZ proposed to re-insert the text "or because of the overriding legitimate interests of another person".

¹²⁵ DE suggested to add a new point (f): "where the data are processed by a micro enterprise which processes data only as an ancillary activity."

Article 15

Right of access for the data subject¹²⁶

1. The data subject shall have the right to obtain from the controller^{127 128} at reasonable intervals and free of charge¹²⁹ (...) confirmation as to whether or not personal data concerning¹³⁰ him or her are being processed ¹³¹ and where such personal data are being processed access to the data and the following information:
- (a) the purposes of the processing¹³²;
 - (b) (...)
 - (c) the recipients or categories of recipients to whom the personal data have been or will be disclosed, in particular ~~to~~ recipients in third countries¹³³;
 - (d) where possible, the envisaged¹³⁴ period for which the personal data will be stored;

¹²⁶ DE and SE scrutiny reservation. DE, LU and UK expressed concerns on overlaps between Articles 14 and 15.

¹²⁷ FR suggested to add a right of access to processors.

¹²⁸ DE suggested to insert "on request".

¹²⁹ DE, ES, HU, IT and PL reservation on the possibility to charge a fee. DE and SE thought that free access once a year should be guaranteed.

¹³⁰ FR suggested to change *concerning* to *belonging* so that different forms of telecommunication would be covered. COM said that *concerning* was used in Article 8 in the Charter.

¹³¹ DE made a text suggestion (8089/15).

¹³² HU thought the legal basis of the processing should be added.

¹³³ UK reservation on the reference to recipients in third countries. IT thought the concept of recipient should be clarified, inter alia by clearly excluding employees of the controller.

¹³⁴ ES and UK proposed adding 'where possible'; FR reservation on 'where possible' and 'envisaged'; FR emphasised the need of providing an exception to archives.

- (e) the existence of the right to request from the controller rectification or erasure of personal data concerning the data subject or to object to the processing of such personal data;
 - (f) the right to lodge a complaint to a supervisory authority (...) ^{135 136};
 - (g) where the personal data are not collected from the data subject, any available information as to their source ¹³⁷;
 - (h) ¹³⁸in the case of decisions based on automated processing including profiling referred to in Article 20(1) and (3), information concerning knowledge of the logic involved ¹³⁹~~in any automated data processing~~ as well as the significance and envisaged consequences of such processing ¹⁴⁰.
- 1a. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 42 relating to the transfer ¹⁴¹.

¹³⁵ DE thought it was too onerous to repeat this for every data subject and pointed to difficulties in ascertaining the competent DPA in its federal structure.

¹³⁶ IT and SK suggestion to delete subparagraphs (e) and (f) as under Article 14 this information should already be communicated to the data subject at the moment of the collection of the data.

¹³⁷ SK scrutiny reservation: subparagraph (g) should be clarified.

¹³⁸ PL made a suggestion (8295/15).

¹³⁹ PL and RO reservation on the reference to 'logic': the underlying algorithm should not be disclosed. SE wanted to delete it. BE and IT opposed the deletion of the words *logic* because it would go below the level of the 1995 Directive (Article 12(a)). DE reservation on reference to decisions.

¹⁴⁰ NL scrutiny reservation. FR likewise harboured doubts on its exact scope.

¹⁴¹ FR and UK scrutiny reservation on links with Chapter V.

1b. On request ¹⁴²and without an excessive charge¹⁴³, the controller shall provide a copy of the personal data undergoing processing to the data subject.

2. (...)

2a. ¹⁴⁴The right to obtain a copy referred to in paragraph 1b (...) shall not apply where such copy cannot be provided without disclosing personal data of other data subjects **or trade secrets of the controller**¹⁴⁵¹⁴⁶.

147

3. (...)

4. (...)

¹⁴² FR made a suggestion for paragraph (1b) in 7464/15.

¹⁴³ ES wanted no charge except in case that the costs are very high or that the data subject requests a special format.

¹⁴⁴ DE made a text suggestion (8089/15).

¹⁴⁵ COM reservation;

DE suggested to redraft point (h): " Redraft point (h) as follows: "in case of decisions based on automated processing including profiling referred to in Article 20(1) and (3), ~~knowledge of and~~ information concerning the logic involved ~~in any automated data processing~~ as well as the significance and envisaged consequences of such processing; the right to obtain this information shall not apply in particular where trade secrets of the controller would be disclosed." NL supported DE suggestion as regards trade secrets.

DE, supported by UK, referred to the danger that data pertaining to a third party might be contained in such electronic copy. FR suggested to add text on intellectual property rights in relation to the processing of personal data with a corresponding recital 51 with the addition of login data.

¹⁴⁶ FR suggested to add "which were not supplied by the data subject to the controller".

¹⁴⁷ DE suggested to add a new paragraph (2a): "There shall be no right of access in accordance with para-graphs 1 and 1b when data are processed by, or are entrusted to become known to, a person who is subject to an obligation of professional secrecy regulated by Union or Member State law or to a statutory obligation of secrecy, except if the data subject is empowered to lift the secrecy in question and acts accordingly."

SECTION 3

RECTIFICATION AND ERASURE

Article 16

Right to rectification¹⁴⁸

1. (...) The data subject shall have the right¹⁴⁹ to obtain from the controller without undue delay¹⁵⁰ the rectification of personal data concerning him or her which are inaccurate. Having regard to the purposes¹⁵¹ 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. (...)

¹⁴⁸ DE and UK scrutiny reservation.

¹⁴⁹ UK, supported by CZ, suggested to insert the qualification 'where reasonably practicable'
UK, supported by CZ, also suggested inserting the qualification 'where necessary'.

¹⁵⁰ Suggestion from the SE.

¹⁵¹ BE asked why the reference to the *purposes* had been inserted.

3.

Article 17

Right to erasure and “to be forgotten”¹⁵²

1. ¹⁵³The (...) controller shall have the obligation to erase personal data without undue delay.

¹⁵² DE, EE, PT, SE, FI, NL and UK scrutiny reservation.
SI reservation on "right to be forgotten".
EE, FR, NL, RO, SE and SK: 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, LU, NL, SE and SI).

AT made a suggestion to distinguish the right to erasure and the right to be forgotten (7586/15 REV1).

¹⁵³ SE suggested to insert in the beginning of the sentence *At the request of the data subject, the controller ...* to indicate that the controller was not supposed to act at its own initiative.

especially in relation to personal data which are collected¹⁵⁴ when the data subject was a child, and the data subject¹⁵⁵ shall have the right to obtain **from the controller**¹⁵⁶ 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;
- (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;¹⁵⁷
- (c) the data subject objects to the processing of personal data¹⁵⁸ 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);

¹⁵⁴ FR suggested to insert "and were made accessible to third parties". In reaction, Cion warned that this could backfire in case the third parties legally obtained the data.

In general, FR, supported by MT, wanted to have a specific set of rights for children and adults of whom data were collected when they were children and to whom not all exceptions listed in paragraph 3 would apply.

¹⁵⁵ SE wanted to delete the part of the text from *without* until *and the data subject*.

¹⁵⁶ Suggestion of DE, supported by Cion.

¹⁵⁷ AT asked if this referred to further processing and wanted that to be clarified in a recital.

¹⁵⁸ NL suggested to refer to a specific request for erasure pursuant to Article 19(1).

- (d) the data have been unlawfully processed¹⁵⁹;
 - (e) the data have to be erased for compliance with a legal obligation to which the controller is subject¹⁶⁰;
 - (f) (...).¹⁶¹
2. (...).

¹⁵⁹ UK and CZ scrutiny reservation: this was overly broad.

¹⁶⁰ 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.

¹⁶¹ FR, supported y CY, CZ, MT, suggested to add: 'the data have been collected when the data subject was a child', with corresponding changes to recital 53. CY support.

2a. *Where the controller¹⁶² (...) has made the personal data public¹⁶³ and is obliged pursuant to paragraph 1 to erase the data, the controller, taking account of available technology and the cost of implementation¹⁶⁴, shall at the request of the data subject¹⁶⁵ take (...) reasonable steps¹⁶⁶, including technical measures, (...) to inform known controllers¹⁶⁷ which are processing the data, that the data subject has specifically requested the erasure by such controllers of any links to, or copy or replication of that personal data¹⁶⁸.*

¹⁶² BE, DE and SI queried whether this also covered controllers (e.g. a search engine) other than the initial controller (e.g. a newspaper).

¹⁶³ DE suggested to add "or has transmitted them to a recipient".

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.

¹⁶⁴ 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. FR raised doubts about the fact that the provision was only applicable when the data had been made public.

¹⁶⁵ FR, supported by Cion, opposed the IE suggestion to insert "at the request of the data subject" arguing that the data subject would not know that there is data concerning him. On the other hand, the IE suggestion was supported by CZ, NL, UK.

¹⁶⁶ 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.

¹⁶⁷ BE suggestion, supported by ES, FI, PL and FR. PL made two alternative suggestions (8295/15). SK suggested to refer instead to controllers with whom the controller has contractual relations. PL suggested instead: "controllers to which the controller intentionally disclosed the information". SI scrutiny reservation.

HU reservation considering that paragraph (2a) does not have added value in light of Article 17b which provides for an obligation by the controller to inform any further known controllers.

Cion reservation considering that "known" was not needed given that the paragraph already sufficiently frames the obligation of the controller to inform other controllers.

¹⁶⁸ FR suggested to add "and on which grounds that request was accepted". 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. ES and PL suggested to delete paragraph 2a. HU found the content of paragraph (2a) not clear as it refers at the same time to an obligation to erase data and to cases where the data subject requested erasure. As a result, it is unclear whether the paragraph applies or not in cases of erasure not on request of the data subject but on other grounds.

3. Paragraphs 1 and 2a shall not apply¹⁶⁹ to the extent that (...) processing of the personal data is necessary:
- a. for exercising the right of freedom of expression and information¹⁷⁰ referred to in Article 80¹⁷¹;

172

- b. *for compliance with a legal obligation which requires processing of*¹⁷³ *personal data by Union or Member State law to which the controller is subject*¹⁷⁴ or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller¹⁷⁵;

¹⁶⁹ 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.

¹⁷⁰ FR queried whether the right to information should be included in the Article considering that this right is linked to Article 80 which does not include search engines. In reaction, Pres argued that the provisions on data controllers apply to search engines. Furthermore, Cion indicated that the freedom of expression and information is in the Charter and therefore the reference in Article 17(3)(a) will not change the interpretation of Article 80.

¹⁷¹ DE and EE asked why this exception had not been extended to individuals using their own freedom of expression (e.g. an individual blogger).

¹⁷² FR suggested to insert a new point (aa): "for the interest of the general public to have access to that information".

¹⁷³ FI suggestion, supported by DE and COM, to narrow down the scope.

¹⁷⁴ In general DE thought it was a strange legal construct to lay down exceptions to EU obligations by reference to national law. DK and SI were also critical in this regard. UK thought there should be an exception for creditworthiness and credit scoring, which is needed to facilitate responsible lending, as well as for judicial proceedings. IT suggested inserting a reference to Article 21(1).

¹⁷⁵ AT, PL scrutiny reservation. PL suggested: to add "when expressly laid down by Union or Member States law".

- c. for reasons of public interest in the area of public health in accordance with Article 9(2) (h)¹⁷⁶ and (hb) as well as Article 9(4)¹⁷⁷;
- d. ¹⁷⁸for archiving purposes in the public interest or for scientific, statistical and historical (...) purposes in accordance with Article 83¹⁷⁹;
- e. (...)
- f. (...)
- g. for the establishment, exercise or defence of legal claims.

180

4. (...)

5. (...)

¹⁷⁶ COM thought that (h) should be deleted.

¹⁷⁷ 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.

¹⁷⁸ FR considered the purposes set out in this point not sufficient ground for refusing the right to erasure.

¹⁷⁹ DE suggested to delete "in accordance with Article 83" and add at the end "where the erasure would involve a disproportionate effort or processing is essential for these purposes".

¹⁸⁰ DE suggested a new paragraph 3a "Where the erasure is carried out, the controller shall not otherwise process such data".

Article 17a

Right to restriction of processing

1. The data subject shall have the right to obtain from the controller the restriction of the processing of personal data where:
 - (a)¹⁸¹ the accuracy of the data is contested by the data subject, for a period enabling the controller to verify the accuracy of the data¹⁸²;
 - (b) the controller no longer needs the personal data for the purposes of the processing, but they are required by the data subject for the establishment, exercise or defence of legal claims; or
 - (c) he or she has objected to processing pursuant to Article 19(1) pending the verification whether the legitimate grounds of the controller override those of the data subject.
2. (...)
3. Where processing of personal data has been restricted under paragraph 1, such data may, with the exception of storage, only be processed with the data subject's consent or for the establishment, exercise or defence of legal claims or for the protection of the rights of another natural or legal person or for reasons of important public interest¹⁸³.

¹⁸¹ FR considered the wording of point (a) ambiguous.

¹⁸² FR scrutiny reservation: FR thought the cases in which this could apply, should be specified.

¹⁸³ DE, RO and SI asked who was to define the concept of public interest. DE reservation.

4. A data subject who obtained the restriction of processing pursuant to paragraph 1 (...) shall be informed by the controller before the restriction of processing is lifted¹⁸⁴.
5. (...)
- 5a. (...) ¹⁸⁵

¹⁸⁴ DE, PT, SI and IT thought that this paragraph should be a general obligation regarding processing, not limited to the exercise of the right to be forgotten. DK likewise thought the first sentence should be moved to Article 22. FR preferred the previous version of the text.

¹⁸⁵ Deleted in view of the new article 83.

Notification obligation regarding rectification, erasure or restriction^{186 187}

The controller shall communicate any rectification, erasure or restriction of processing carried out in accordance with Articles 16, 17(1) and 17a to each **known**¹⁸⁸ recipient to whom the data have been disclosed (...), **unless this proves impossible or involves disproportionate effort**¹⁸⁹.

¹⁸⁶ Whilst several delegations agreed with this proposed draft and were of the opinion that it added nothing new to the existing obligations under the 1995 Directive, some delegations (DE, PL, SK and NL) pointed to the possibly far-reaching impact in view of the data multiplication since 1995, which made it necessary to clearly specify the exact obligations flowing from this proposed article. Thus, DE, supported by PL, was opposed to a general obligation to log all the disclosures to recipients. DE, supported by PL, also pointed out that the obligation should exclude cases where legitimate interests of the data subject would be harmed by a further communication to the recipients, that is not the case if the recipient would for the first time learn negative information about the data subject in which he has no justified interest. BE and ES asked that the concept of a 'disproportionate effort' be clarified in a recital.

¹⁸⁷ DE suggested a new Article 17c on dispute settlement (7567/15). Supported by IE, FR and opposed by IT.

¹⁸⁸ BE suggestion, supported by ES, FR and PL.

AT, DE suggested to delete "known".

SI scrutiny reservation on "known".

Cion reservation on "known" arguing that there are already conditions set to the recipients with whom the controller needs to communicate and that having "known" could make controllers refrain from making an effort. Furthermore, "known" recipients would go below the data protection standards of Directive 95/46/EC.

DE suggested: "The controller shall inform the data subject about those recipients if the data subject requests this."

¹⁸⁹ DK, supported by Cion, wanted to re-insert the phrase", unless this proves impossible or involves a disproportionate effort".

Article 18
Right to data portability¹⁹⁰

1. (...)

¹⁹⁰ UK reservation: while it supports the concept of data portability in principle, the UK considers it not within scope of data protection, but in consumer or competition law. Several other delegations (DK, DE, FR, IE, NL, PL and SE) also wondered whether this was not rather a rule of competition law and/or intellectual property law or how it related to these fields of law. Therefore the UK thinks this article should be deleted.
SI: scrutiny reservation.
NL and CZ thought its scope should be limited to social media.
DE, DK and UK pointed to the risks for the competitive positions of companies if they were to be obliged to apply this rule unqualifiedly and referred to/raises serious issues about intellectual property and commercial confidentiality for all controllers. DE, FI, HU, SE and UK also underscored the considerable administrative burdens this article would imply. DE and FR referred to services, such as health services where the exercise of the right to data portability might endanger on-going research or the continuity of the service. Reference was also made to an increased risk of fraud as it may be used to fraudulently obtain the data of innocent data subjects (UK). DE, ES, FR, HR, HU, IE, PL and NO were in principle supportive of this right. SK thought that the article was unenforceable and DE, supported by HU, referred to the difficulty/impossibility to apply this right in 'multi-data subject' cases where a single 'copy' would contain data from several data subjects, who might not necessarily agree or even be known or could not be contacted, for example group photos. HU therefore questioned the added value of this right. CZ, DE, DK, FI, RO and NO thought that the exclusion of the public sector should be mentioned not only in recital 55, but also here (ES was opposed thereto).
ES, FR (7464/15) and RO wanted data portability to mean the transmission of data from one controller to another. However, a majority of delegations see the right to portability as the right to get at copy without hindrance and to transmit data from one controller to another controller.

2. The data subject shall have the right to ~~receive~~ ~~withdraw~~¹⁹¹ the personal data¹⁹² concerning him or her **and any other related information**¹⁹³ which he or she has provided to a controller¹⁹⁴ ~~and receive it~~ in a structured and¹⁹⁵ commonly used¹⁹⁶ and¹⁹⁷ machine-readable format without hindrance from the controller to which the data have been provided to, where
- (a) the processing is based on consent pursuant to point (a) of Article 6(1) or point (a) of Article 9 (2) or on a contract pursuant to point (b) of Article 6 (1); and
- (b) the processing is carried out by automated means¹⁹⁸.

¹⁹¹ IE preferred the term *withdraw*. BE, EL, HU, supported by Cion preferred *obtain*. UK reservation on "withdraw" considering that "withdraw" has the connotation of leaving no data behind and, therefore, duplicates the right to erasure. UK suggested instead "obtain (a copy for further use)". FR did not agree with the UK views considering it possible to use the right to erasure and data portability in parallel.

¹⁹² PL suggested to specify that this pertained to personal data in their non-aggregated or non-modified form. DE also queried about the scope of this right, in particular whether it could extend to data generated by the controller or data posted by third persons.

¹⁹³ Suggestion by DE, supported by Cion.

¹⁹⁴ AT suggested instead the term "service provider" making also a suggestion for modification (8089/15). Cion pointed out that what is relevant is that the controller decides not whether it is a service provider or not.

¹⁹⁵ Consistency of language with Article 15(2).

¹⁹⁶ DE and FI queried whether this meant the scope was restricted to currently used formats (excluding future developments) and whether it implied an obligation for controllers to use one of these commonly used formats.

¹⁹⁷ PT thought 'and' should be deleted.

¹⁹⁸ BE, DE, ES, IE and FR thought emphasis should be put on the right to withdraw data, also with a view to creating an added value as compared to the right to obtain a copy of personal data. CY and HU also thought the obligation of the controller should be emphasised.

- 2a. The exercise of this right shall be without prejudice to Article 17. The right referred to in paragraph 2 shall **not apply ~~be without prejudice~~ to processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller carried out by public authorities or bodies.**¹⁹⁹²⁰⁰
- 2aa. The right referred to in paragraph 2 shall be without prejudice to intellectual property rights in relation to the processing of those personal data²⁰¹.
- [3. The Commission may specify (...) the technical standards, modalities and procedures for the transmission of personal data pursuant to paragraph 2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).]²⁰²
4. (...) ²⁰³.

¹⁹⁹ IT: scrutiny reservation on last sentence.

IE, supported by CY, NL, Cion, suggested instead: "The right referred to in paragraph 2 shall not apply to processing carried out by public authorities or bodies".

²⁰⁰ FR preferred wording related to the public purpose rather than to the public bodies.

²⁰¹ ES thought there should be an exception in case disproportionate efforts would be required.

²⁰² FR, HU, SE and UK reservation: this would better set out in the Regulation itself. SE did not see the need for this provision and meant that such measures for transmission could quickly be outdated; the paragraph should therefore be deleted. CZ supported the deletion of the paragraph. In contrast, COM saw the need to specify technicalities.

DE suggested the EDPB instead of the Commission.

²⁰³ Deleted in view of the new Article 83

SECTION 4

RIGHT TO OBJECT AND PROFILING

Article 19

Right to object²⁰⁴

1. The data subject shall have the right to object, on **compelling legitimate**²⁰⁵ grounds relating to his or her particular situation²⁰⁶, at any time to the processing of personal data concerning him or her which is based on points (...) (e)²⁰⁷ or (f) of Article 6(1).

²⁰⁴ DE, ES, AT, SI, SK and UK scrutiny reservation.
AT made a suggestion for modification (8089/15).
FR made suggestions to modify Article 19 (7464/15). Furthermore, FR wanted data subjects to have the right to object in case of processing for purposes covered by Article 9(2)(i) unless this processing is done for public interest purposes.
PL did not want a right to object in relation to processing referred to in Article 83.

²⁰⁵ IE, FI, UK could accept re-insertion of (e) provided the use of "compelling legitimate".
AT, FR, MT, PL rejected "compelling legitimate" in the first line.
DK opposed the use of the term "compelling legitimate" in the whole paragraph.
CZ opposed "compelling legitimate" in the before last line.
Cion reservation considering "compelling legitimate" not acceptable given Article 6(1)(f) and because it undermines making use of the right to object. This wording would allow that even compelling legitimate grounds of the data subject could be overridden by the controller; this would go below the protection level of Directive 96/46.

²⁰⁶ AT suggested to delete "relating to his or her particular situation" because the right to object is a fundamental human right.

²⁰⁷ The reference to point (e) of Article 6(1) was restored in view of the support PL, IT, DK, ES, DE, RO, SI, AT, EL, CY. Objected by UK, DE, BE, CZ, FI, HU and NL.COM stated that 1995 Directive contained a reference to point (e). UK, supported by DE, queried whether the right to object would still apply in a case where different grounds for processing applied simultaneously, some of which are not listed in Article 6. ES and LU queried why Article 6(1) (c) was not listed here. ES asked that a reference to Article 6(2) be added.

The controller shall *no longer process* the personal data (...) unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, (...) rights and freedoms of the data subject²⁰⁸ or compelling legitimate grounds for *the establishment, exercise or defence of legal claims*²⁰⁹.

²⁰⁸ SE scrutiny reservation: SE and NL queried the need to put the burden of proof on the controller regarding the existence of compelling legitimate grounds. DE and FI queried the need for new criteria, other than those from the 1995 Directive. COM stressed that the link with the 'particular situation' was made in order to avoid narrow objections. CZ also stated that this risked making processing of data an exceptional situation due to the heavy burden of proof. NL and SE queried whether the right would also allow objecting to any processing by third parties.

²⁰⁹ Moved from paragraph (1a). UK proposed adding ' for demonstrating compliance with the obligations imposed under this instrument'. This might also cover the concern raised by DE that a controller should still be able to process data for the execution of a contract if the data were obtained further to a contractual legal basis. CZ, DK, EE, IT, SE and UK have likewise emphasised the need for allowing to demonstrate compliance. CZ and SK also referred to the possibility of further processing on other grounds.

- 1a. (...)
2. Where personal data are processed for direct marketing²¹⁰ purposes, the data subject shall have the right to object²¹¹ (...) at any time to the processing of personal data concerning him or her for such marketing. **At the latest at the time of the first communication with the data subject Prior to processing,** this²¹² right²¹³ shall be explicitly brought to the attention of the data subject (...) and shall be presented clearly and separately from any other information²¹⁴.
- 2a. Where the data subject objects to the processing for direct marketing purposes, the personal data shall no longer be processed for such purposes.
3. (...)
4. (...)

²¹⁰ FR and UK underlined the need to have clarity regarding the exact content of this concept, possibly through a definition of direct marketing. DE asked which cases were covered exactly.

²¹¹ DE suggested to insert: "free of charge".

²¹² Suggestion by BE.

DE, supported by PL and preliminary BE and NL, suggested instead: "In approaching the data subject,".

²¹³ DE suggestion, supported by COM, to inform the data subject as soon as possible of the right to object.

²¹⁴ At the request of several delegations (FR, LT, PT), COM confirmed that this paragraph was not meant to create an opt-in system and that the E-Privacy Directive would remain unaffected. DE feels there is a need to clarify the relationship between Article 19(2) on the one hand and Article 6(1)(f) and Article 6(4) on the other. It can be concluded from the right to object that direct marketing without consent is possible on the basis of a weighing of interests. On the other hand, Article 6(1)(f) no longer refers to the interests of third parties and Article 6(4) also no longer refers to Article 6(1)(f) in regard to data processing which changes the original purpose. DE is therefore of the opinion that this also needs to be clarified in view of online advertising and Directive 2002/58/EC and Article 89 of the Proposal for a Regulation.

Article 20

Automated individual decision making²¹⁵

1. The data subject shall have the right not to be subject to a decision (...) based solely on automated processing, including profiling, which produces legal effects concerning him or her or significantly affects him or her.²²¹

²¹⁵ DE, ES, FR, AT, HU, NL, PL, SE and UK scrutiny reservation.
AT suggested: " Decision making on automated personal processing".
IT reservation SI agreed with the Cion.
DE made a suggestion to add paragraphs to Article 20 (8089/15).
DE thinks this provision must take account of two aspects, namely, whether and under what conditions a profile (= the linking of data which permits statements to be made about a data subject's personality) may be created and further processed, and, secondly, under what conditions a purely automated measure based on that profile is permissible if the measure is to the particular disadvantage of the data subject. It appears expedient to include two different rules in this regard. According to DE Article 20 only covers the second aspect and DE would like to see a rule included on profiling in regard to procedures for calculating the probability of specific behaviour (cf. Article 28b of the German Federal Data Protection Act, which requires that a scientifically recognized mathematical/statistical procedure be used which is demonstrably essential as regards the probability of the specific behaviour).
ES was not favourable to the new drafting and asked that the objective was. DE stressed that it was important to look at the definition of profiling in order to ensure consistency. IT said that the way the Article was drafted it dealt with decisions based on profiling and not profiling as a technique. IT noted that for example fingerprints and exchanges between machines would be more common in the future.

²¹⁶ IE, supported by ES, wanted to delete the words from *a decision* until *him or her*.

²¹⁷ PL suggested "predominantly" instead of "solely".

²¹⁸ AT suggested to delete profiling and replace it with "such" (8089/15).

²¹⁹ CZ suggested to insert "similarly". In reaction, Cion indicated this would lower data protection standards.

²²⁰ PL suggested to clarify in a recital the meaning of "significantly affects him or her".
DE and PL wondered whether automated data processing was the right criterion for selecting high risk data processing operations and provided some examples of automated data processing operation which it did not consider as high risk. DE and ES pointed out that there are also cases of automated data processing which actually were aimed at increasing the level of data protection (e.g. in case of children that are automatically excluded from certain advertising). IT was concerned about the word *significantly* and wanted it clarified in a recital. COM meant that it could be clarified in a recital.

²²¹ DE meant that the title and definition in Article 4(12a) required a particular need for clarification.

- 1a. Paragraph 1 shall not apply if the decision²²²: (...)
- (a) is necessary for entering into, or performance of, a contract between the data subject and a data controller (...)²²³; or
 - (b) is (...) authorized by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
 - (c) is based on the data subject's explicit consent (...).
- 1b. In cases referred to in paragraph 1a (a) and (c)²²⁴ the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least²²⁵ the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision²²⁶:
2. (...)

²²² COM suggestion.

²²³ NL had proposed to use the wording 'and arrangements allowing him to put his point of view, inspired by Article 15 of Directive 95/46. BE suggested adding this for each case referred in paragraph 2. NL meant that profiling was more about transparency for the data subject.

²²⁴ CZ reservation preferring the text in the 1995 Directive.

IE suggestion.

PL suggested instead to refer to "Article (1a)".

²²⁵ BE suggestion, supported by FR.

²²⁶ NL had proposed to use the wording 'and arrangements allowing him to put his point of view, inspired by Article 15 of Directive 95/46.

3. ²²⁷Decisions referred to in paragraph 1a shall not (...) be based on special categories of personal data referred to in Article 9(1), unless points (a) or (g)²²⁸ of Article 9(2) apply and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests²²⁹ are in place.
4. (...)
5. (...)²³⁰

²²⁷ SK considered the paragraph to provide insufficient guarantees.

²²⁸ UK did not want to limit processing to only points (a) or (g) so it suggested to delete the reference to points (a) and (g) whereas HU wanted to add point (c).

²²⁹ BE, FR, IT, PL, PT, AT, SE and UK reservation FR and AT reservation on the compatibility with the E-Privacy Directive. BE would prefer to reinstate the term 'solely based', but FR and DE had previously pointed out that 'not ... solely' could empty this prohibition of its meaning by allowing sensitive data to be profiled together with other non-sensitive personal data. DE would prefer to insert a reference to a the use of pseudonymous data.

²³⁰ DE suggested new paragraphs 4-6 (7586/15) because of particular constitutional sensitivities. NL approved parts of it, especially paragraph 4 and thought that it was good to impose obligations on the controller.

SECTION 5 RESTRICTIONS

Article 21

Restrictions²³¹

1. Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in (...) Articles 12 to 20 and Article 32, as well as Article 5²³² in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 20, when such a restriction constitutes a necessary and proportionate measure in a democratic society to safeguard:
 - (aa) national security;
 - (ab) defence;
 - (a) public security;
 - (b) the prevention, investigation, detection and prosecution of criminal offences and, for these purposes, safeguarding public security²³³, or the execution of criminal penalties;

²³¹ DE suggested a new recital (48a) (7586/1/15 REV1).
AT recalled the note of AT, SI, HU to the 3354th Council.
SI and UK scrutiny reservation.

SE and UK wondered why paragraph 2 of Article 13 of the 1995 Data Protection Directive had not been copied here. DE, supported by DK, HU, RO, PT and SI, stated that para. 1 should not only permit restrictions of the rights of data subjects but also their extension. For example, Article 20(2)(b) requires that Member States lay down 'suitable measures to safeguard the data subject's legitimate interests', which, when they take on the form of extended rights of access to information as provided for under German law in the case of profiling to assess creditworthiness (credit scoring), go beyond the Proposal for a Regulation.
²³² AT reservation.

²³³ The wording of points (b), and possibly also point (a), will have to be discussed again in the future in the light of the discussions on the relevant wording of the text of the Data Protection Directive for police and judicial cooperation.

- (c) other important objectives of general public interests of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including, monetary, budgetary and taxation matters, public health and social security, the protection of market stability and integrity;
- (ca) the protection of judicial independence and judicial proceedings;
- (d) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;
- (e) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (aa), (ab), (a), (b), (c) and (d);
- (f) the protection of the data subject or the rights and freedoms of others;
- (g) the enforcement of civil law claims.

2. Any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to the purposes of the processing or categories of processing, the categories of personal data, the scope of the restrictions introduced, the specification of the controller or categories of controllers, the storage periods and the applicable safeguards taking into account of the nature, scope and purposes of the processing or categories of processing and the risks for the rights and freedoms of data subjects.
