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**NOTE**

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From:	Presidency
To:	Working Group on Information Exchange and Data Protection (DAPIX)
No. prev. doc.:	8372/15
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) - Chapter I and XI

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In light of the outcome of the DAPIX meeting on 6/7 May 2015 on the Chapters I and XI of the General Data Protection Regulation, the Presidency submits some new Presidency compromise suggestions which are indicated in **bold**. The comments of delegations are reflected in the footnotes.

The Presidency reminds delegations that Articles 1, 3 and paragraphs (13), (17), (19), (19a), (19b), (19c) and (21) of Article 4 as well as recitals 7-12, 16a and 19-29 have already been the subject of a partial general approach.

As the proposed Chapters have been discussed on several DAPIX meetings already, Presidency invites Member States to express their opinion about Article 2, paragraphs (7), (9), (10) and (12) of Article 4 and Chapter XI.

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- 1) The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union and Article 16(1) of the Treaty lay down that everyone has the right to the protection of personal data concerning him or her.
- 2) The (...) principles and rules on the protection of individuals with regard to the processing of their personal data should, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably their right to the protection of personal data. It should contribute to the accomplishment of an area of freedom, security and justice and of an economic union, to economic and social progress, the strengthening and the convergence of the economies within the internal market, and the well-being of individuals.
- 3) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>1</sup> seeks to harmonise the protection of fundamental rights and freedoms of natural persons in respect of processing activities and to guarantee the free flow of personal data between Member States.
- 3a) The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced with other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union as enshrined in the Treaties, notably the right to respect for private and family life, home and communications, the right to the protection of personal data, the freedom of thought, conscience and religion, the freedom of expression and information, the freedom to conduct a business, the right to an effective remedy and to a fair trial as well as cultural, religious and linguistic diversity.

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<sup>1</sup> OJ L 281, 23.11.1995, p. 31.

- 4) The economic and social integration resulting from the functioning of the internal market has led to a substantial increase in cross-border flows. The exchange of data between (...) public and private actors, including individuals and undertakings across the Union has increased. National authorities in the Member States are being called upon by Union law to co-operate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State.
- 5) Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of data sharing and collecting has increased spectacularly. Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities. Individuals increasingly make personal information available publicly and globally. Technology has transformed both the economy and social life, and should further facilitate the free flow of data within the Union and the transfer to third countries and international organisations, while ensuring a high level of the protection of personal data.
- 6) These developments require (...) a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market. Individuals should have control of their own personal data and legal and practical certainty for individuals, economic operators and public authorities should be reinforced.<sup>2</sup>

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<sup>2</sup> DE proposal to add such wording to recital “As far as the General Data Protection Regulation provides for legislative measures of the Member States for specifications (e.g. Article. 1 paragraph 2a, Article 6 paragraph 3, Article 83) and restrictions (e.g. Article 21) the Member States may, in their national law, repeat the wording of the various rights and provisions under the General Data Protection Regulation if the national legislators find this to be necessary in the interest of those the rules apply to.”

- 7) The objectives and principles of Directive 95/46/EC remain sound, but it has not prevented fragmentation in the way data protection is implemented across the Union, legal uncertainty and a widespread public perception that there are significant risks for the protection of individuals associated notably with online activity. Differences in the level of protection of the rights and freedoms of individuals, notably to the right to the protection of personal data, with regard to the processing of personal data afforded in the Member States may prevent the free flow of personal data throughout the Union. These differences may therefore constitute an obstacle to the pursuit of economic activities at the level of the Union, distort competition and impede authorities in the discharge of their responsibilities under Union law. This difference in levels of protection is due to the existence of differences in the implementation and application of Directive 95/46/EC.

- 8) In order to ensure a consistent and high level of protection of individuals and to remove the obstacles to flows of personal data within the Union, the level of protection of the rights and freedoms of individuals with regard to the processing of such data should be equivalent in all Member States. Consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data should be ensured throughout the Union. Regarding the processing of personal data for compliance with a legal obligation,<sup>3</sup> for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, Member States should be allowed to maintain or introduce national provisions to further specify the application of the rules of this Regulation. In conjunction with the general and horizontal law on data protection implementing Directive 95/46/EC Member States have several sector specific laws in areas that need more specific provisions. This Regulation also provides a margin of manoeuvre for Member States to specify its rules. Within this margin of manoeuvre sector-specific laws that Member States have issued implementing Directive 95/46/EC should be able to be upheld.
- 9) Effective protection of personal data throughout the Union requires strengthening and detailing the rights of data subjects and the obligations of those who process and determine the processing of personal data, but also equivalent powers for monitoring and ensuring compliance with the rules for the protection of personal data and equivalent sanctions for offenders in the Member States.
- 10) Article 16(2) of the Treaty mandates the European Parliament and the Council to lay down the rules relating to the protection of individuals with regard to the processing of personal data and the rules relating to the free movement of personal data.

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<sup>3</sup> AT, supported by SI, made a proposal for a separate Article 82b which would allow Member States to adopt specific private sector provisions for specific situations (15768/14 DATAPROTECT 176 JAI 908 MI 916 DRS 156 DAPIX 179 FREMP 215 COMIX 623 CODEC 2300). The Presidency thinks that the revised recital 8 read together with Article 1(2a) sufficiently caters for this concern.

- 11) <sup>4</sup>In order to ensure a consistent level of protection for individuals throughout the Union and to prevent divergences hampering the free movement of data within the internal market, a Regulation is necessary to provide legal certainty and transparency for economic operators, including micro, small and medium-sized enterprises, and to provide individuals in all Member States with the same level of legally enforceable rights and obligations and responsibilities for controllers and processors (...), to ensure consistent monitoring of the processing of personal data, and equivalent sanctions in all Member States as well as effective co-operation by the supervisory authorities of different Member States. The proper functioning of the internal market requires that the free movement of personal data within the Union should not be restricted or prohibited for reasons connected with the protection of individuals with regard to the processing of personal data. (...)

To take account of the specific situation of micro, small and medium-sized enterprises, this Regulation includes a number of derogations. In addition, the Union institutions and bodies, Member States and their supervisory authorities are encouraged to take account of the specific needs of micro, small and medium-sized enterprises in the application of this Regulation. The notion of micro, small and medium-sized enterprises should draw upon Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

- 12) The protection afforded by this Regulation concerns natural persons, whatever their nationality or place of residence, in relation to the processing of personal data. With regard to the processing of data which concern legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person, the protection of this Regulation should not be claimed by any such person. (...).

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<sup>4</sup> SI: reservation.

- 13) The protection of individuals should be technologically neutral and not depend on the techniques used; otherwise this would create a serious risk of circumvention. The protection of individuals should apply to processing of personal data by automated means as well as to manual processing, if the data are contained or are intended to be contained in a filing system. Files or sets of files as well as their cover pages, which are not structured according to specific criteria, should not fall within the scope of this Regulation.
- 14) This Regulation does not address issues of protection of fundamental rights and freedoms or the free flow of data related to activities which fall outside the scope of Union law, such as activities concerning national security, ~~taking into account Articles 3 to 6 of the Treaty on the Functioning of the European Union~~ (...) nor does it cover the processing of personal data by the Member States when carrying out activities in relation to the common foreign and security policy of the Union. <sup>5</sup>
- 14a)<sup>6</sup> Regulation (EC) No 45/2001<sup>7</sup> applies to the processing of personal data by the Union institutions, bodies, offices and agencies<sup>8</sup>. Regulation (EC) No 45/2001 and other Union legal instruments applicable to such processing of personal data should be adapted to the principles and rules of this Regulation.

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<sup>5</sup> NL prefers not to have specific references to provisions in the Treaty.

<sup>6</sup> BE, supported by DE and IE, suggested to delete recital (14a).

PL expressed support for the EP amendment on recital(14) of the Commission proposal. CZ proposes that recital 14a includes explicit reference to the already stated intention of the Commission to propose an overhaul of Regulation 45/2001/EC to harmonize it with this Regulation in time for it to enter into force at the same moment. It could be said then that while the updated Regulation 45/2001/EC will provide for the same level of data protection, it will be tailored better to the specificities of EU institutions.

Cion referred to its statement made at the JHA Council in June 2013 in which it has indicated its intention to align Regulation 45/2001 after agreement on the GDPR.

<sup>7</sup> OJ L 8, 12.1.2001, p. 1.

<sup>8</sup> FR, SI: scrutiny reservation about applicable rules for EU agencies.

- 15) This Regulation should not apply to processing of personal data by a natural person in the course of a personal or household activity, and thus without a connection with a professional or commercial activity. Personal and household activities include social networking and on-line activity undertaken within the context of such personal and household activities.<sup>9</sup> However, this Regulation should (...) apply to controllers or processors which provide the means for processing personal data for such personal or domestic activities.
- 16) 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, the execution of criminal penalties [as well as the maintaining of law and order and the safeguarding of public security<sup>10</sup>.] and the free movement of such data, is subject of a specific legal instrument at Union level. Therefore, this Regulation should not apply to the processing activities for those purposes. However, data processed by public authorities under this Regulation when used for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties should be governed by the more specific legal instrument at Union level (Directive XX/YYYY).

When processing of personal data by (...) private bodies falls within the scope of this Regulation, this Regulation should provide for the possibility for Member States under specific conditions to restrict by law certain obligations and rights when such a restriction constitutes a necessary and proportionate measure in a democratic society to safeguard specific important interests including public security and the prevention, investigation, detection and prosecution of criminal offences. This is relevant for instance in the framework of anti-money laundering or the activities of forensic laboratories.

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<sup>9</sup> DE queried whether it should be clarified in the regulation whether the household exemption of Article 2(2)(c) applies regardless of the number of data subjects affected. In this context, ES and IT referred to the discussions in the Article 29 working group. BE reacted that the rules of the GDPR are too complicated for individual persons. IE, UK expressed doubts about trying to specify the household exemption.

<sup>10</sup> Cion reservation.  
The exact wording of the recital and of Article 2(2)(e) will need to be aligned to that of the data protection Directive still under discussion.

- 16a) While this Regulation applies also to the activities of courts and other judicial authorities, Union or Member State law could (...), specify the processing operations and processing procedures in relation to the processing of personal data by courts and other judicial authorities. The competence of the supervisory authorities should not cover the processing of personal data when courts are acting in their judicial capacity, in order to safeguard the independence of the judiciary in the performance of its judicial tasks, including its decision-making. Supervision of such data processing operations may be entrusted to specific bodies within the judicial system of the Member State, which should in particular control compliance with the rules of this Regulation, promote the awareness of the judiciary of their obligations under this Regulation and deal with complaints in relation to such processing.
- 17) Directive 2000/31/EC does not apply to questions relating to information society services covered by this Regulation. That Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between Member States. Its application should not be affected by this Regulation. This Regulation should therefore be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive.
- 18) (...)

- 19) Any processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union should be carried out in accordance with this Regulation, regardless of whether the processing itself takes place within the Union or not. Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in this respect.
- 20) In order to ensure that individuals are not deprived of the protection to which they are entitled under this Regulation, the processing of personal data of data subjects residing in the Union by a controller not established in the Union should be subject to this Regulation where the processing activities are related to the offering of goods or services to such data subjects irrespective of whether connected to a payment or not, which takes place in the Union. In order to determine whether such a controller is offering goods or services to such data subjects in the Union, it should be ascertained whether it is apparent that the controller is envisaging doing business with data subjects residing in one or more Member States in the Union. Whereas the mere accessibility of the controller's or an intermediary's website in the Union or of an email address and of other contact details or the use of a language generally used in the third country where the controller is established, is insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, and/or the mentioning of customers or users residing in the Union, may make it apparent that the controller envisages offering goods or services to such data subjects in the Union.
- 21) The processing of personal data of data subjects residing in the Union by a controller not established in the Union should also be subject to this Regulation when it is related to the monitoring of their behaviour taking place within the European Union. In order to determine whether a processing activity can be considered to 'monitor the behaviour' of data subjects, it should be ascertained whether individuals are tracked on the internet with data processing techniques which consist of profiling an individual, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes.

- 22) Where the national law of a Member State applies by virtue of public international law, this Regulation should also apply to a controller not established in the Union, such as in a Member State's diplomatic mission or consular post.
- 23) The principles of data protection should apply to any information concerning an identified or identifiable natural person. Data including pseudonymised data, which could be attributed to a natural person by the use of additional information, should be considered as information on an identifiable natural person. To determine whether a person is identifiable, account should be taken of all the means reasonably likely to be used either by the controller or by any other person to identify the individual directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the individual, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration both available technology at the time of the processing and technological development. The principles of data protection should therefore not apply to anonymous information, that is information which does not relate to an identified or identifiable natural person or to data rendered anonymous in such a way that the data subject is not or no longer identifiable. This Regulation does therefore not concern the processing of such anonymous information, including for statistical and research purposes<sup>11</sup>.
- 23a) The application of pseudonymisation to personal data can reduce the risks for the data subjects concerned and help controllers and processors meet their data protection obligations. The explicit introduction of ‘pseudonymisation’ through the articles of this Regulation is thus not intended to preclude any other measures of data protection.

23b) (...)

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<sup>11</sup> The question of the application of the Regulation to deceased persons may need to be revisited in the future.

- 23c) In order to create incentives for applying pseudonymisation when processing personal data, measures of pseudonymisation whilst allowing general analysis should be possible within the same controller when the controller has taken technical and organisational measures necessary to ensure that the provisions of this Regulation are implemented, taking into account the respective data processing and ensuring that additional information for attributing the personal data to a specific data subject is kept separately. The controller who processes the data shall also refer to authorised persons within the same controller. In such case however the controller shall make sure that the individual(s) performing the pseudonymisation are not referenced in the meta-data<sup>12</sup>.
- 24) When using online services, individuals may be associated with online identifiers provided by their devices, applications, tools and protocols, such as Internet Protocol addresses or cookie identifiers. This may leave traces which, when combined with unique identifiers and other information received by the servers, may be used to create profiles of the individuals and identify them. Identification numbers, location data, online identifiers or other specific factors as such should not (...) be considered as personal data if they do not identify an individual or make an individual identifiable<sup>13</sup>.

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<sup>12</sup> BE: reservation suggesting to at the end: "Identification should be understood in a broad manner and therefore also includes the possibility to single out individuals, such as with the use of digital identities."

Cion, HU, IE, IT, AT, SE, UK reservation and FR scrutiny reservation on two last sentences. IT, SI suggested to delete the last sentence.

AT suggested to delete the recital.

<sup>13</sup> DE reservation. AT and SI thought the last sentence of the recital should be deleted.

25) Consent should be given unambiguously by any appropriate method enabling a freely-given, specific and informed indication of the data subject's wishes, either by a written, including<sup>14</sup> electronic, oral statement or, if required by specific circumstances, by any other clear affirmative action by the data subject signifying his or her agreement to personal data relating to him or her being processed. This could include ticking a box when visiting an Internet website or any other statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of their personal data. Silence or inactivity should therefore not constitute consent. Where it is technically feasible and effective, the data subject's consent to processing may be given by using the appropriate settings of a browser or other application<sup>15</sup>. In such cases it is sufficient that the data subject receives the information needed to give freely specific and informed consent when starting to use the service. (...). Consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, unambiguous consent should be granted for all of the processing purposes. <sup>16</sup>If the data subject's consent is to be given following an electronic request, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided<sup>17</sup>.

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<sup>14</sup> HU and DE would prefer to distinguish electronic from written statements.

<sup>15</sup> PL and AT reservation.

<sup>16</sup> Moved to the recital 25aa) according to IE proposal to set provisions in separate recital. The meaning and the wording of recital is not changed.

<sup>17</sup> UK, supported by CZ and IE, proposed adding: 'Where the intention is to store data for an as yet unknown research purpose or as part of a research resource [such as a biobank or cohort], then this should be explained to data subjects, setting out the types of research that may be involved and any wider implications. This interpretation of consent does not affect the need for derogations from the prohibition on processing sensitive categories of data for scientific purposes'.

25a) Genetic data should be defined as personal data relating to the genetic characteristics of an individual which have been inherited or acquired as they result from an analysis of a biological sample from the individual in question, in particular by chromosomal, deoxyribonucleic acid (DNA)<sup>18</sup> or ribonucleic acid (RNA) analysis or **scientific** analysis of any other element enabling equivalent information to be obtained. **As well data of whatever type concerning the hereditary characteristics of an individual or concerning the pattern of inheritance of such characteristics within a related group of individuals<sup>19</sup>.**

**25aa) It is often not possible to fully identify the purpose of data processing for scientific purposes at the time of data collection. Therefore data subjects can give their consent to certain areas of scientific research when in keeping with recognised ethical standards for scientific research<sup>20</sup>. Data subjects should have the opportunity to give their consent only to certain areas of research or parts of research projects to the extent allowed by the intended purpose and provided that this does not involve disproportionate efforts in view of the protective purpose<sup>21</sup>.**

26) Personal data concerning health should include (...) data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health of the data subject<sup>22</sup>; including information about the registration of the individual for the provision of health services (...); a number, symbol or particular assigned to an individual to uniquely identify the individual for health purposes; (...) information derived from the testing or examination of a body part or bodily substance, including genetic data and biological samples; (...) or any information on for example a disease, disability, disease risk, medical history, clinical treatment, or the actual physiological or biomedical state of the data subject independent of its source, such as for example from a physician or other health professional, a hospital, a medical device, or an in vitro diagnostic test.

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<sup>18</sup> SI: reservation considering DNA biometric data.

<sup>19</sup> Council of Europe Recommendation N°R(97)5.

<sup>20</sup> FR and COM scrutiny reservation.

<sup>21</sup> AT, CZ, IE and FR scrutiny reservation; COM reservation.

<sup>22</sup> The Presidency points out that this recital may have to be aligned to the definition of health data (Article 4(12)) to be agreed in the future.

27) The main establishment of a controller in the Union should be the place of its central administration in the Union, unless the decisions on the purposes and means of the processing of personal data are taken in another establishment of the controller in the Union. In this case the latter should be considered as the main establishment. The main establishment of a controller in the Union should be determined according to objective criteria and should imply the effective and real exercise of management activities determining the main decisions as to the purposes (...) and means of processing through stable arrangements. This criterion should not depend on whether the processing of personal data is actually carried out at that location; the presence and use of technical means and technologies for processing personal data or processing activities do not, in themselves, constitute such main establishment and are therefore not determining criteria for a main establishment. The main establishment of the processor should be the place of its central administration in the Union and, if it has no central administration in the Union, the place where the main processing activities take place in the Union. In cases involving both the controller and the processor, the competent lead supervisory authority should remain the supervisory authority of the Member State where the controller has its main establishment but the supervisory authority of the processor should be considered as a concerned supervisory authority and participate to the cooperation procedure provided for by this Regulation. In any case, the supervisory authorities of the Member State or Member States where the processor has one or more establishments should not be considered as concerned supervisory authorities when the draft decision concerns only the controller.

Where the processing is carried out by a group of undertakings, the main establishment of the controlling undertaking should be considered as the main establishment of the group of undertakings, except where the purposes and means of processing are determined by another undertaking.

- 28) A group of undertakings should cover a controlling undertaking and its controlled undertakings, whereby the controlling undertaking should be the undertaking which can exercise a dominant influence over the other undertakings by virtue, for example, of ownership, financial participation or the rules which govern it or the power to have personal data protection rules implemented. A central **body undertaking** which supervises the processing of personal data in **undertakings institutions** affiliated to it forms together with these **undertakings institutions** an entity which may be treated as “group of undertakings”<sup>23</sup>.
- 29) Children (...) deserve specific protection of their personal data, as they may be less aware of risks, consequences, safeguards and their rights in relation to the processing of personal data. (...) <sup>24</sup>. This concerns especially the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of child data when using services offered directly to a child<sup>25</sup>.
- 133) Since the objectives of this Regulation, namely to ensure an equivalent level of protection of individuals and the free flow of data throughout the Union, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- 134) Directive 95/46/EC should be repealed by this Regulation. However, Commission decisions adopted and authorisations by supervisory authorities based on Directive 95/46/EC should remain in force.
- 135) This Regulation should apply to all matters concerning the protection of fundamental rights and freedom vis-à-vis the processing of personal data, which are not subject to specific obligations with the same objective set out in Directive 2002/58/EC, including the obligations on the controller and the rights of individuals. In order to clarify the relationship between this Regulation and Directive 2002/58/EC, the latter Directive should be amended accordingly.

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<sup>23</sup> FI proposal supported by NL.  
SI reservation.

<sup>24</sup> COM reservation on deletion of the UN Convention on the Rights of the Child reference.

<sup>25</sup> CZ and AT reservation.

HAVE ADOPTED THIS REGULATION:

## CHAPTER I

### GENERAL PROVISIONS

#### *Article 1*

#### *Subject matter and objectives*<sup>26</sup>

1. This Regulation lays down rules relating to the protection of individuals with regard to the processing of personal data and rules relating to the free movement of personal data.
2. This Regulation protects (...) fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.
- 2a. Member States<sup>27</sup> may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to the processing of personal data for compliance with a legal obligation or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or for other specific processing situations as provided for in Article 6(1)(c) and (e) by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX<sup>28</sup>.

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<sup>26</sup> DE suggested to insert new recital (48a) (8089/15).

FR suggested to insert a reference that data subjects have a right to obtain their data. FR suggested to insert "Data subjects have the right to decide upon the communication and use of their personal data within the conditions and limits set forth in the present regulation".

<sup>27</sup> BE suggested to insert "and institutions of the European Union". DE and IE considered this suggestion worth considering. In response to queries of BE, CZ, DE, HU, NL, ES about non applicability to EU institutions Cion referred to recital (14a) and the remarks made at the JHA Council in June 2013 that the Regulation applicable to the EU Institutions would be applicable at the same time as the GDPR and the Police Directive

<sup>28</sup> AT (15768/15), HU, SI and SK reservation. These delegations were in favour of a minimum harmonisation clause for the public sector. HU, supported by SK requested to clarify the limits of paragraph (2a).

LU reservation considering this offers too much leeway.

3. The free movement of personal data within the Union shall neither be restricted nor prohibited for reasons connected with the protection of individuals with regard to the processing of personal data<sup>29</sup>.

## *Article 2*

### ***Material scope***

1. This Regulation applies to the processing of personal data wholly or partly by automated means, and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system<sup>30</sup>.
2. This Regulation does not apply to the processing of personal data:
  - (a) in the course of an activity which falls outside the scope of Union law (...);
  - (b) by the Union institutions, bodies, offices and agencies<sup>31</sup>;
  - (c) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the Treaty on European Union;
  - (d) by a natural person (...) in the course of (...)<sup>32</sup> a personal or household activity;

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

<sup>30</sup> HU, supported by EE and IT, and disadvised by IE and Cion referring to the long discussions on data processed by non automated means, objected to the fact that data processing operations not covered by this phrase would be excluded from the scope of the Regulation and thought this was not compatible with the stated aim of a set of comprehensive EU data protection rules. HU therefore proposed to replace the second part by the following wording 'irrespective of the means by which personal data are processed'. Cion further argued that the text of draft regulation not implied a restriction compared to the directive currently in force which refers to filing systems.

<sup>31</sup> The Presidency suggests not to apply the regulation to Union institutions, bodies, offices and agencies in line with the current acquis where the rules for processing of personal data by Union institutions, bodies, offices and agencies are laid down in Regulation (EC) No 45/2001. The new EU data protection framework based on Article 16 TFEU will cover both Member States and EU institutions and bodies. The Commission intends to present the necessary proposals which will align Regulation 45/2001 with the principles and rules of the General Data Protection Regulation as agreed by the co-legislators. The Commission intends to present such proposals in a timely manner in order to ensure that the amended Regulation 45/2001 can enter into application at the same time as the General Data Protection Regulation.

<sup>32</sup> AT suggested to insert "solely" or "exclusively" both in Article 2 and in recital (15) with a view to avoid lowering standards compared to the directive currently in force.

- (e) [by competent (...) authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences, the execution of criminal penalties as well as the maintaining of law and order and the safeguarding of public security<sup>33</sup>].

3. (...).

### *Article 3*

#### ***Territorial scope***

1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union.
2. This Regulation applies to the processing of personal data of data subjects residing in the Union by a controller not established in the Union, where the processing activities are related to:
  - (a) the offering of goods or services, irrespective of whether a payment by the data subject is required, to such data subjects in the Union; or
  - (b) the monitoring of their behaviour as far as their behaviour takes place within the European Union<sup>34</sup>.
3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where the national law of a Member State applies by virtue of public international law.

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<sup>33</sup> Cion: reservation. The exact wording of Article 2(2)(e) and the corresponding recital (16) will need to be aligned to that of the data protection Directive still under discussion.

<sup>34</sup> UK reservation.

*Article 4*  
***Definitions***

For the purposes of this Regulation:

- (1) <sup>35</sup>'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly (...), in particular by reference to an identifier<sup>36</sup> such as a name, an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person.
- (2a) (...)
- (3) 'processing' means any operation or set of operations which is performed upon personal data or sets of personal data, whether or not by automated means<sup>37</sup>, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination (...) restriction, erasure or destruction<sup>38</sup>;
- (3a) 'restriction of processing' means the marking of stored personal data with the aim of limiting their processing in the future<sup>39</sup>;

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<sup>35</sup> BE suggested to change the definition on the basis of recital (23).

<sup>36</sup> UK is concerned that, together with recital 24, this will lead to risk-averse approach that this is always personal data.

<sup>37</sup> HU suggested to delete "whether or not by automated means".

<sup>38</sup> Suggestion of DE, FR and SK which regretted that not all elements included in the list of data processing operations of the directive currently in force are listed in the definition of processing. These delegations argued these elements were especially useful in the public sector. COM indicated that the right to have the processing restricted in certain cases was provided for in Article 17a (restriction of data processing), even though the terminology 'blocking' was not used there. The term "blocking" was not used because it has a special connotation on the Internet related to censorship. DE and FR thought the definition of Article 4(3) (erasure) should be linked to Article 17.

<sup>39</sup> FR, RO scrutiny reservation.

- (3b) <sup>40</sup>'pseudonymisation' means the processing of personal data in such a way that the data can no longer be attributed to a specific data subject without the use of additional information, as long as such additional information is kept separately and subject to technical and organisational measures to ensure non-attribution to an identified or identifiable person (...)<sup>41 42</sup>;
- (4) 'filing system' means any structured set of personal data which are accessible according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis<sup>43</sup>;
- (5) 'controller' means the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes (...) and means of the processing of personal data; where the purposes (...) and means of processing are determined by Union law or Member State law, the controller or the specific criteria for his nomination may be designated by Union law or by Member State law;<sup>44</sup>
- (6) 'processor' means a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller;

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<sup>40</sup> SE considered pseudonymisation to become obsolete given that future technological developments will make it possible to identify a data subject on the basis of minimal data. For that reason, SE proposed: " 'pseudonymisation' means processing of personal data where technological and/or organizational protection measures are applied to the personal data, in particular to make the data inaccessible to any person who is not authorized to access it."

<sup>41</sup> DE, supported by CZ, NL and UK, proposed reinserting the following reference 'or can be attributed to such person only with the investment of a disproportionate amount of time, expense and manpower'.

<sup>42</sup> BE suggested a new definition (3c) for a "specific data subject" which specifies that a specific data subject encompasses both the civil identity of the data subject and his or her digital identity.

<sup>43</sup> DE, SI, SK and UK scrutiny reservation. DE and SI thought this was completely outdated concept. COM explained that the definition had been taken over from Directive 95/46/EC and is related to the technical neutrality of the Regulation, as expressed in Article 2(1).

<sup>44</sup> CZ: delete "and means".

- (7) 'recipient' means a natural or legal person, public authority, agency or any other body ~~other than the data subject, the initial data controller or the initial data processor~~<sup>46</sup> to which the personal data are disclosed, whether a third party or not;<sup>47</sup> however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients<sup>48 49</sup>;
- (8) 'the data subject's consent' means any freely-given, specific and informed (...) <sup>50</sup> indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action, signifies agreement to personal data relating to them being processed;

<sup>45</sup> DE, DK, FR, HU, IT, LU and NL, opposed by Cion, requested the inclusion of a definition of third party.

HU suggested: 'third party' means a natural or legal person, public authority, agency or any other body other than the data subject, the data controller or the data processor."

<sup>46</sup> BE, FR, supported by Cion, reservation about "other than the initial processor" in light of the link with Article 14.

<sup>47</sup> Suggestion of DE, FR, LU, NL, SI and SE which regretted the deletion from the 1995 Data Protection Directive of the reference to third party disclosure and pleaded in favour of its reinstatement. COM argued that this reference was superfluous and that its deletion did not make a substantial difference. CZ suggested to delete "whether a third party or not". COM reservation on the exclusion of controllers and processors, arguing this would go below the level of the 1995 Data Protection Directive (Article 2(g)).

<sup>48</sup> AT, ES, HU, HR, NL suggested to delete the phrase "however ... recipients" and DE, UK scrutiny reservation on latter part of previous text of the definition. IE insisted on keeping this phrase.

Suggestion by AT, ES, IT (supported by FR and Cion to go back to the wording of the directive currently in force), NL and UK thought it could be deleted.

HU, opposed by PL suggested: " recipient means a natural or legal person, public authority, agency or any other body to which personal data are disclosed".

<sup>49</sup> AT suggested to insert a definition of further processing under reference to its Statement to the JHA Council in March 2015.

<sup>50</sup> COM, CY, GR, HU, IT, PL and RO reservation on the deletion of 'explicit'.

- (9) 'personal data breach' means a breach **of security**<sup>51</sup> leading to the accidental or unlawful destruction<sup>52</sup>, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed<sup>53</sup>;
- (10) 'genetic data' means all personal data relating to the genetic characteristics of an individual that have been inherited or acquired, **during pre-natal development, which give unique information about the physiology or the health of that individual**<sup>54</sup>, resulting from an analysis of a biological sample from the individual in question<sup>55</sup>;

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<sup>51</sup> In light of opposition CZ, IE, FR, IT, NL and Cion on deletion "of security", Presidency re-inserts this phrase.

HU suggestion: "personal security breach means a breach of the provisions of this Regulation leading to any unlawful operation or set of operations performed upon personal data such as the accidental ..."

<sup>52</sup> HU suggested "... breach of the provisions of this regulation leading to any unlawful operation performed on personadata such as...". Cion did not support this suggestion.

<sup>53</sup> COM, supported by LU, explained that it sought to have a similar rule as in the E-Privacy Directive, which should be extended to all types of data processing.

DE scrutiny reservation questioned the very broad scope of the duty of notifying data breaches, which so far under German law was limited to sensitive cases. NL, LV and PT concurred with DE and thought this could lead to over-notification. In the meantime the scope of Articles 31 and 32 has been limited.

AT, HU found the focus of the definition on security breaches too narrow.

<sup>54</sup> AT, FI: scrutiny reservation.

DK, ES, IT, MT, NL, SE rejected the limitation to "during pre-natal development" considering that genetic data can change after birth for example as a result of a cancer treatment. DE found this phrase important.

In this context, BE referred to Recommendation 97/15 of the Council of Europe.

CZ reservation considering that genetic changes can also take place after birth, for example after a transplantation.

<sup>55</sup> AT, CY, DE, FR, IT and SE scrutiny reservation. Several delegations (CH, CY, DE and SE) expressed their surprise regarding the breadth of this definition, which would also cover data about a person's physical appearance.

DE thought the definition should differentiate between various types of genetic data. The definition is now explained in the recital 25a.

- (11) 'biometric data' means any personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of an individual which allows or confirms the<sup>56</sup> unique identification of that individual, such as facial images, or dactyloscopic data<sup>57</sup>;
- (12) 'data concerning health' means data related to the physical or mental health of an individual, which reveal information about his or her health status<sup>58</sup>;
- (12a) 'profiling' means any form of automated processing of personal data consisting of using those data to evaluate personal aspects relating 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<sup>59</sup>;
- (12b) (...) <sup>60</sup>

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<sup>56</sup> ES preferred 'allows' SI: scrutiny reservation on last part.

<sup>57</sup> SE and AT scrutiny reservation. SI did not understand why genetic data were not included in the definition of biometric data. FR queried the meaning of 'behavioural characteristics of an individual which allow their unique identification'. ES explained that research is done to recognising persons by the way they move or speak. CH is of the opinion that the term 'biometric data' is too broadly defined. SK, supported by HU, suggested to specify when "facial images" are biometric data in a recital.

<sup>58</sup> SI reservation and AT, DE scrutiny reservation. COM scrutiny reservation. BE, CZ, DE, DK and SI considered definition too broad. BE queried what "reveal" means. BE also suggested "intending to reveal" in definition (12) and recital (26). In reaction, Cion pointed out that the directive currently in force already uses "reveal". BE: reservation. CZ, SI suggested to insert "specific" before information.

<sup>59</sup> BE, RO and SE scrutiny reservation. BE, FR, LU, SI and RO would prefer reverting to the Council of Europe definition.

IT: scrutiny reservation.

<sup>60</sup> IT: scrutiny reservation

(13) ‘main establishment’ means<sup>61</sup>

- as regards a controller with establishments in more than one Member State, the place of its central administration in the Union, unless the decisions on the purposes (...) and means of the processing of personal data are taken in another establishment of the controller in the Union and the latter establishment has the power to have such decisions implemented, in this case the establishment having taken such decisions shall be considered as the main establishment<sup>62</sup>.
- as regards a processor with establishments in more than one Member State, the place of its central administration in the Union and, if the processor has no central administration in the Union, the establishment of the processor in the Union where the main processing activities in the context of the activities of an establishment of the processor take place to the extent that the processor is subject to specific obligations under this Regulation;

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<sup>61</sup> AT remarked that, in view technological developments, it was very difficult to pinpoint the place of processing and, supported by ES, HU, PL, expressed a preference for a formal criterion, which referred to the incorporation of the controller. AT pointed out that such criterion would avoid the situation that, depending on the processing activity concerned, there would be a different main establishment and consequently a different lead DPA.

<sup>62</sup> BE reservation.

- (14) 'representative' means any natural or legal person established in the Union who, (...) designated by the controller in writing pursuant to Article 25, represents the controller with regard to the obligations of the controller under this Regulation (...);
- (15) 'enterprise' means any natural or legal person engaged in an economic activity, irrespective of its legal form, (...) including (...) partnerships or associations regularly engaged in an economic activity;
- (16) 'group of undertakings' means a controlling undertaking and its controlled undertakings<sup>63</sup>;
- (17) 'binding corporate rules' means personal data protection policies which are adhered to by a controller or processor established on the territory of a Member State of the Union for transfers or a set of transfers of personal data to a controller or processor in one or more third countries within a group of undertakings<sup>64</sup> or group of enterprises engaged in a joint economic activity;
- (18) (...) <sup>65</sup>
- (19) 'supervisory authority' means an independent public authority which is established by a Member State pursuant to Article 46;
- (19a) 'concerned supervisory authority' means
- a supervisory authority which is concerned by the processing because:
    - a) the controller or processor is established on the territory of the Member State of that supervisory authority;

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<sup>63</sup> DE scrutiny reservation. UK scrutiny reservation on all definitions in paragraphs 10 to 16.

<sup>64</sup> DE queried whether BCRs could also cover intra-EU data transfers. COM indicated that there was no need for BCRs in the case of intra-EU transfers, but that controllers were free to apply BCRs also in those cases.

<sup>65</sup> HU wanted to include as well non profit organisations.

<sup>65</sup> COM scrutiny reservation on the deletion of the definition of a child.

b) data subjects residing in this Member State are substantially<sup>66</sup> affected or likely to be substantially affected by the processing; or

c) the underlying complaint has been lodged to that supervisory authority.

(19b) “transnational processing of personal data” means either:

(a) processing which takes place in the context of the activities of establishments in more than one Member State of a controller or a processor in the Union and the controller or processor is established in more than one Member State; or

(b) processing which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect<sup>67</sup> data subjects in more than one Member State.

(19c) “relevant and reasoned objection” means :

an objection as to whether there is an infringement of this Regulation or not, or, as the case may be, whether the envisaged action in relation to the controller or processor is in conformity with the Regulation. The objection shall clearly demonstrate the significance of the risks posed by the draft decision as regards the fundamental rights and freedoms of data subjects<sup>68</sup> and where applicable, the free flow of personal data.

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<sup>66</sup> IE and UK would prefer the term 'materially'.

<sup>67</sup> Several Member States thought that this should be clarified in recital: CZ, FI, HU, SE, SK.

<sup>68</sup> IE thought that also risks to the controller should be covered.

- (20) 'Information Society service' means any service as defined by Article 1 (2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services<sup>69 70 71</sup>.
- (21) 'international organisation' means an organisation and its subordinate bodies governed by public international law or any other body which is set up by, or on the basis of, an agreement between two or more countries<sup>72</sup>;

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<sup>69</sup> OJ L 204, 21.7.1998, p. 37–48.

<sup>70</sup> UK suggests adding a definition of 'competent authority' corresponding to that of the future Data Protection Directive.

<sup>71</sup> BE, DE, FR and RO suggest adding a definition of 'transfer' ('communication or availability of the data to one or several recipients'). RO suggests adding 'transfers of personal data to third countries or international organizations is a transmission of personal data object of processing or designated to be processed after transfer which ensure an adequate level of protection, whereas the adequacy of the level of protection afforded by a third country or international organization must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations'.

<sup>72</sup> NL queried whether MOUs would also be covered by this definition; FI queried whether Interpol would be covered. CZ, DK, LV, SI, SE and UK pleaded in favour of its deletion.

# CHAPTER XI

## FINAL PROVISIONS

### *Article 88*

#### ***Repeal of Directive 95/46/EC***

1. Directive 95/46/EC is repealed.
2. <sup>73</sup>References to the repealed Directive shall be construed as references to this Regulation. References to the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC shall be construed as references to the European Data Protection Board established by this Regulation.

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<sup>73</sup> UK: reservation. UK considers that the current drafting does not work for the purposes it is intended to achieve. Propose to redraft article : “References to particular parts or provisions in the repealed Directive are to be construed as references to the equivalent provisions in the Regulation [..].”  
IT: scrutiny reservation  
IE pointed to the practical problems of repeal of Directive 95/46/EC and replacement by the new GDPR. DE, NL queried whether a list existed of legislative acts that would be affected by such replacement. Cion indicated that a transitional period of 2 years is foreseen.

Article 89<sup>74 75</sup>

***Relationship to and amendment of Directive 2002/58/EC***<sup>76</sup>

1. This Regulation shall not impose additional obligations on natural or legal persons in relation to the processing of personal data in connection with the provision of publicly available electronic communications services in public communication networks in the Union in relation to matters for which they are subject to specific obligations with the same objective set out in Directive 2002/58/EC.

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<sup>74</sup> FI suggested to insert a related recital: "In relation to this Regulation, the information security measures that are meant to protect the transmission and confidentiality of communications can be regulated nationally under the Article 4 and 5 of the Directive 2002/58/EC and under the Article 13a of the framework Directive 2002/21/EC."

<sup>75</sup> IE scrutiny reservation reasoning that art 89 seems an exemption to the general rule laid down in Art 98 by specifying that the GDPR shall not impose additional obligations. CZ, DK, IE, IT, FI, NL, UK wanted to keep 89 with deletion of para 2 (as in the text now). BG expressed preference for deleting art 89 but could be flexible. FR scrutiny reservation, inter alia s regards the phrase "the same objective". FR did not necessarily want to delete para 2.

PL, SI: scrutiny reservation.

DE requested clarification of Cion why article 89 was proposed.

AT wanted to delete art 89 so that Directive 2002/58/EC would be covered by art 88.

<sup>76</sup> AT, BE, DK, FR, IT: scrutiny reservation concerning the consistent application of the e-Privacy Directive and the GDPR. In reaction, Cion indicated that the e-Privacy Directive complements Directive 95/46/EC. The e-Privacy Directive will need to be adapted after adoption of the GDPR.

FR queried why only a reference was made to the e-Privacy Directive and not also to fi the e-commerce Directive.

AT, supported by HU, suggested to add: "When in doubt, this Regulation is applicable and not Directive 2002/58/EC when more beneficial for the data subject."

2 (...)

*Article 89a*

***Relationship to previously concluded Agreements***

*International agreements involving the transfer of personal data to third countries or international organisations which were concluded by Member States prior to the entry into force of this Regulation, and which are in compliance with Directive 95/46/EC, shall remain in force until amended, replaced or revoked*<sup>77</sup>.

*Article 90*

***Evaluation***

1. The Commission shall submit reports on the evaluation and review of this Regulation to the European Parliament and the Council at regular intervals.<sup>78</sup>
2. In the context of these evaluations the Commission shall examine, in particular, the application and functioning of the provisions of Chapter VII on Co-operation and Consistency.
3. The first report shall be submitted no later than four years after the entry into force of this Regulation. Subsequent reports shall be submitted every four years thereafter. The reports shall be made public.

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<sup>77</sup> Cion reservation based on strong legal doubts on the legality of such proposal. Cion refers to recital (79).

AT, HU: reservation and DE, DK, IT, PL, RO and UK scrutiny reservation considering that all relevant international agreements need to be checked if they are in compliance and they can only be adapted in cooperation with the third country contracting parties.

<sup>78</sup> DE, supported by FI, wanted to specify other aspects that in particular needed to be evaluated. DE suggested to add: - the functioning of the provisions of chapter III and their effects in practice on the data subjects and controllers; and  
- the functionality of the provisions of this Regulation with regard to new technological developments.

IE, UK, supported by Cion, wanted the phrase on OSS to be in a separate paragraph.

PL: scrutiny reservation wanting the EDPB to be involved in the evaluation.

4. The Commission shall, if necessary, submit appropriate proposals with a view to amending this Regulation, and aligning other legal instruments, in particular taking account of developments in information technology and in the light of the state of progress in the information society.

*Article 91*

***Entry into force and application***

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.
2. It shall apply from [two years from the date referred to in paragraph 1]<sup>79</sup>.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament*

*For the Council*

*The President*

*The President*

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<sup>79</sup> CZ, DE, FR scrutiny reservation about the moment of applicability of the regulation on data individual processing operations so as to provide legal certainty and avoid bureaucracy. BG, CZ, FI, HU, SE wanted a longer transitional period for the Regulation to become applicable than the foreseen 2 years. In reaction, Cion responded that a 2 years' transitional period is special for applicability of a regulation. Furthermore, Cion referred to Article 42(5b) which provided for continuity.