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Subject:	Data protection package - Report on progress achieved under the Cyprus Presidency - 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) - Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data

I. General

1. The purpose of this Presidency note is to report to the Council on the progress achieved on the comprehensive data protection package which was adopted by the Commission on 25 January 2012. This package comprises two legislative proposals based on Article 16

TFEU, the new legal basis for data protection measures introduced by the Lisbon Treaty. The first proposal, for a General Data Protection Regulation, seeks to replace the 1995 Data Protection Directive[1]. The second proposal, for a Directive of the European Parliament and of the Council on data protection in the field of police and judicial cooperation in criminal matters, is intended to replace Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters[2].

2. In keeping with the approach taken by the Danish Presidency, the Presidency, while working on both proposals, and having stated on numerous occasions that it treats the two proposals as an integral package, has devoted more time to work on the General Data Protection Regulation. In terms of breadth of application, this is the most ambitious piece of draft legislation in the justice area during this parliamentary term, covering all private entities, public authorities and individuals in the EU. Scrutiny by data protection experts from 27 Member States, aimed at ensuring that the future Regulation is a high-quality legal instrument that maintains a high level of data protection across the EU, and minimises, to the extent possible, burdens on enterprises, is a long, meticulous and time-consuming process. The Presidency therefore decided to allocate as much meeting time as possible to this proposal.

3. This has allowed the Working Party on Information Exchange and Data Protection (DAPIX) to continue the examination of the proposal up to Chapter 5 of the draft Regulation. The result of these discussions and the written contributions from Member States is set out in a separate note from the Presidency[3]. The Presidency shared the view taken by Member States that initial goal should be to first achieve more clarity on the proposed general EU data protection rules, before deciding upon new data protection rules for the law enforcement sector. Nevertheless, the Presidency has continued with the first examination of the text of the proposal for a Directive on data protection in the field of police and judicial cooperation in criminal matters and will continue this work during the remainder of its Presidency.

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1 OJ L 281, 23.11.1995, p. 31.
2 OJ L 350, 30.12.2008, p. 60.
3 16529/12 DATAPROTECT 133 JAI 820 MI 754 DRS 132 DAPIX 146 FREMP 142 COMIX 655 CODEC 274.

4. At the July JHA Informal Ministerial Meeting in Nicosia, the Presidency invited ministers to discuss three horizontal issues arising from the Commission proposal for a General Data Protection Regulation on which delegations had expressed a variety of concerns in the course of technical discussion in the DAPIX Council Working Party. These concerns specifically related to the delegated and implementing acts in the proposed Regulation, the administrative burdens imposed by the draft Regulation and the application of data protection rules to the public sector. Hereafter an overview is given on the discussions that have taken place regarding these three themes.

II. Delegated and implementing acts

5. The Commission proposal contains a large number of instances in which empowerments for delegated (26) or implementing (22) acts are proposed. The Commission explained that these empowerments were proposed in order to avoid the Regulation being over prescriptive, to ensure technological neutrality and openness to future technological developments. A clear majority of Member States has positioned itself against the these proposals, both in quantitative (the extent to which these issues will remain open after the adoption of the Regulation) and qualitative terms (the extent to which the Commission proposals conform to the requirements of Articles 290 and 291 TFEU, such as the requirement that such empowerments can only be conferred as regards non-essential elements of the legislative act). The Commission has nevertheless indicated that the regulation could be applied without these empowerments while these empowerments should only be understood as a tool of last resort, if all other tools for a harmonised approach fail. In that context the Commission has referred in particular to other solutions that could be envisaged in lieu of delegated and implementing acts, such as the possibility that the proposed European Data Protection Board could issue guidelines, recommendations and best practices to ensure consistent application of the Regulation by the national Data Protection authorities. It has also referred to the role of this Board in the proposed consistency mechanism, recommendations and best practices, certification mechanisms, and to the drawing up of self-regulatory codes of conduct and to set up certification mechanism to support the coherent application of the Regulation. Delegations were receptive to the possibility of eventually considering some of these alternatives, arguing nonetheless that an empowerment should only be allowed for cases where there was a demonstrable need for delegated or implementing acts, and not just as a fall-back position.

Members States also argued that the empowerments should be examined in the light of relevant case law such as ECJ recent judgement C-335/10 regarding essential and non-essential elements. It has been argued that the number of empowerments in the Commission proposal may be linked to the nature of the instrument which the Commission has chosen.

6. The Presidency issued a questionnaire on the case-by-case revision of the Commission proposals for delegated and implementing acts, to which almost all delegations have contributed. On the basis of these replies, and on the basis of expert discussions, it appears that the majority of delegated acts are rejected by Member States. There is more willingness among Member States to accept or discuss implementing acts in a number of cases, but there are also a number of implementing acts which are rejected by Member States.

7. In the course of the discussions, the Commission indicated its willingness to engage in a discussion of possible alternatives to the use of delegated or implementing acts. It also indicated that where a delegated or implementing act was proposed, the exercise of this power could be further qualified in three ways:
    1) by inserting procedural rules in the empowerment, for example as regards specific consultation arrangements to be followed by the Commission;
    2) by putting substantive conditions on the empowerment; or
    3) by limiting the scope of the empowerment.

8. In the questionnaire Member States were invited to indicate which alternatives they would prefer in case a Commission proposal for a delegated act or implementing act could not be accepted. Other than the deletion of a proposed Commission empowerment, alternatives that were evoked in the course of expert discussions were included in the questionnaire, such as providing more details in the substantive provisions of the Regulation itself or other alternatives mentioned above.

9. It has also been opined that Member States could further specify some details in national law. This leads to the question of whether and to what extent Member States will be able adopt or keep in place rules on data protection following the adoption of the Regulation. Whilst it appears difficult at this stage to provide a detailed statement for each article on the scope, if any, for Member State law specifying the application of the Regulation, it is obvious that, as a general rule, national law must respect the Regulation.

10. Another important question was whether the possible deletion of an empowerment necessitated the replacement of that proposed act by an alternative solution. In a number of cases, delegations expressed reservations on the need for alternatives, and cautioned against a tendency towards over-regulation.

11. The conclusion emerging from the discussions was that until the first complete reading of the text is finalised, Member States are not in a position to make choices regarding the alternatives to be adopted in those cases where the Commission proposal for a delegated or implementing act cannot be accepted. This is mainly due to two factors. First, in a number of cases, the substance of the rules for which the Commission proposes to have recourse to delegated and/or implementing acts has not yet been discussed at experts level. Second, a number of the possible alternatives, such as the role of data protection authorities, of the European Data Protection Board or the consistency mechanism have not yet been discussed at experts level either – rendering the consideration of possible alternatives a largely speculative exercise, which Member States were not prepared to engage in.

III. Administrative burdens and compliance costs

12. The Commission proposal to replace the 1995 Data Protection Directive by a more detailed instrument and the choice of a Regulation is itself based on the objective to eliminate the current situation of fragmented rules on data protection, varying considerably from Member State to Member State, something which is obviously detrimental to the good functioning of the internal market. In its impact assessment the Commission argued that its proposal will reduce administrative burden on companies by EUR 2.3 billion. This finding was questioned by a limited number of delegations at technical level, which argued that a broader view of costs imposed by the Regulation should be taken, in order to include general compliance costs, and not just administrative burdens. Some of the most important additional compliance costs – such as data protection officers, and data protection impact -assessments – have been estimated in the Commission's Impact Assessment[4]. Most delegations questioned the Commission's assessment and consider that the overall compliance costs arising out of the future Regulation outweigh any economies that may result from the proposal.

[4] See Annex 6 of the Commission's Impact Assessment, SEC(2012)72 final.

13. The level of prescriptiveness is necessarily higher in a Regulation than a Directive, as the former is directly applicable and needs no further transposition into Member State law. Nevertheless, Member States have voiced their disagreement with the level of prescriptiveness of a number of the proposed obligations in the draft Regulation. In its proposal the Commission has tried to mitigate some of the administrative burden flowing from its proposal by providing for a so-called SME exception to some of the obligations for small and medium-sized enterprises, i.e. companies employing less than 250 employees (e.g. Article 28 on documentation obligations) and, on the other hand, by linking certain obligations to the 'riskiness' of the processing (e.g. Article 33 on Data Protection Impact Assessment). In some other cases, this approach is combined (e.g. as regards the designation of the Data Protection Officer, Article 35).

14. There is general consensus among delegations that this SME exception is not an optimal solution in all cases. Obligations aimed at ensuring an appropriate level of data protection should not be differentiated only by reference to the number of employees employed by the company, as this criterion bears no relation to how sufficiently personal data will be protected.

15. Therefore the Presidency has invited delegations to give their views on alternative ways of reducing administrative burden while maintaining the necessary level of protection of individual rights. In doing so delegations were asked to identify criteria in order to determine the possibility and scope for differentiating, in specific cases, the applicability of obligations on data controllers (for example, depending on the type of processing, the core activities of the controller, risks for the data subjects, number of data subjects affected, and so forth). Many delegations have stated that the risk inherent in certain data processing operations should be the main criterion for calibrating the applicability of data protection obligations. Where the data protection risk is higher, more detailed obligations would be justified and where it is comparably lower, the level of prescriptiveness can be reduced.

16. Therefore, there appears to be a general consensus that future work in this area should aim at introducing a strengthened risk-based approach into the draft Regulation. This approach will need to balance two distinct elements, namely on the one hand the possible detriment to the data subject in relation to his individual rights and freedoms (e.g. reputational damage, discrimination, financial loss, identity theft) and on the other hand the elements that are likely to influence the probability that a danger may actually materialise[5].

17. This is an important aspect of proportionality, but when deciding about the exact drafting of the data protection obligations in the draft Regulation, obviously the risk will also need to be balanced against entrepreneurial freedom (private sector) and the tasks of general interest which public authorities carry out (public sector). There seems to be a general consensus among Member States that the proposed General Data Protection Regulation should follow a risk-based approach, whereby the obligations of data controllers and processors are calibrated, in particular, to the nature of the processing and of the data being processed, and in relation to their impact on individuals' rights and freedoms.

18. Many Member States seem to agree on the need of introducing a 'horizontal clause' in the Regulation, and in particular under Chapter IV (on the controllers and processors' responsibility), enshrining the risk-based approach. At the same time, Member States agreed that such a clause needs to be accompanied by the introduction of specific risk-based elements in certain provisions.

[5] The draft Regulation as proposed by the Commission already offers an example of risk-assessment and contextualisation of legal obligations, particularly as regards the obligation to conduct data protection impact assessments (draft Article 33).

19. A risk-based approach can also be described as an endeavour to reduce data breaches. In the context of such an approach to the framing of data protection rules, an important question is who should assess and bear the burden of reducing the risk of data breaches. Some delegations have argued that there is a definite duty on data subjects to behave responsibly in order to avoid or minimise some of the risks involved in certain types of data processing, e.g. when using social media. In the course of the expert discussions, it has also been argued that some of the more prescriptive requirements on data controllers should be replaced by enhancing accountability for controllers. The Commission proposal already contains a number of elements involving accountability of data controllers, in particular the duty to draw up a data protection impact assessment (Article 33), but some delegations have argued that much more emphasis should be put on the accountability of controllers, as they are in the best position to assess the risk involved in certain data processing operations. It has been opined that an approach under which controllers are encouraged to take risk-based, targeted and proportionate action to protect personal data (cf. Article 22(3)) and held responsible for possible data breaches may be more effective in terms of outcome than an a number of prescriptive requirements, which may result in a 'tick-box' compliance culture with little real enhancement of data protection. At the same time it has been emphasised that introducing more accountability in the proposal should not endanger legal certainty and that the rules applicable to controllers should always be clearly spelled out. This has also shown that a horizontal 'risk-based' clause will not do away with the need to define, on an article-by-article basis, the exact content and scope of obligations on data controllers.

IV. More flexibility for the public sector

20. The choice of a Regulation as the legal instrument to regulate data protection in the EU was made in view of the goal - shared by most delegations - to arrive at more harmonisation than is currently the case under the 1995 Data Protection Directive. However, some delegations think this objective should not apply to the public sector, arguing from an early stage in the discussions for the need for more flexibility regarding data protection rules for the public sector, to enable them to adapt these rules to their national regimes. The Commission, on the other hand, argued that harmonisation in this area is also necessary as cross-border exchange of data is necessarily also increasing between public authorities in key areas such as taxation, social security, health, banking and financial markets supervision, and that, more generally, individuals in the European Union should be able to expect also similar levels of data protection in the public sector in Member States, given that the fundamental right to data protection did not differentiate between public and private sector.

21. At an early stage of the discussions many Member States already made it clear that they need more flexibility regarding data protection rules for the public sector to enable them to adapt these rules to their constitutional, legal and institutional setup. The discussions which have taken place on this issue, both at technical and at political level, have shown that this issue is one of particular sensitivity and importance to delegations.

22. At the July JHA Informal Ministerial Meeting in Nicosia, when Ministers debated the application of data protection rules to the public sector, a number of delegations raised this issue, arguing in favour of regulating data protection in the public sector in a separate instrument. Several other delegations, however, pronounced themselves against such an option, arguing instead in favour of regulating both public and private sectors in one single instrument, albeit with an inbuilt degree of flexibility for the public sector, to be decided on a case-by-case basis.

23. At the JHA Council in October several delegations took the floor to discuss the form and the scope of the proposed legal instrument. A number of Member States shared the view that the Regulation needs to provide more flexibility for the public sector, in order to allow adequate room for manoeuvre for domestic processing by Member State authorities. The need to maintain specific national rules for processing by public authorities as regulated by national law, while at the same time strengthening citizens' fundamental rights was also mentioned.

24. The Commission stated that, among others, Articles 6(1)(c) and (e), (3) and 21 of the Regulation provide Member States with sufficient flexibility for the public sector. This position was doubted by some Member States, which called for clarification as to whether a Regulation could adequately and with certainty provide sufficient flexibility for Member States' specific data protection laws, particularly in the public sector, incorporating specific data protection provisions. There is therefore a need to explore the levels of flexibility that can be built into the framework of the Regulation.

V. Conclusion

25. In view of the above, the Presidency invites COREPER/Council to:

1) take note of this progress report;

2) agree that the question as to which empowerments for delegated and implementing acts need to be deleted and by which alternatives they need to be replaced, will be decided following completion of the first examination of the text of the draft Regulation;

3) instruct the competent Council Working Group (DAPIX) to continue to work on concrete proposals to implement a strengthened risk-based approach in the text of the draft Regulation, without increasing associated costs on data controllers and without lowering the level of data protection for individuals; and

4) *agree that the question as to whether and how the Regulation can provide flexibility for the Member States' public sector, will be decided following completion of the first examination of the text of the draft Regulation.*