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NOTE

From: Presidency
To: Working Group on Information Exchange and Data Protection (DAPIX)
Subject: Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)
- Chapters III and VIII

After the DAPIX meeting on 23-24 March 2015 and in order to prepare the DAPIX meeting on 30-31 March 2015, the Presidency has prepared a number of questions relating to Chapter III and VIII. The questions are set out below in order of appearance in the text.

I. CHAPTER III

Transparent information, communication and modalities for exercising the rights for the data subject (Article 12)

At the DAPIX meeting the question was raised as to whether the controller would need to provide the data subject with the information within a fixed deadline, as the current text of paragraph 2 states 'without undue delay and at the latest within a month', or if it was preferable to maintain only the first part 'without undue delay'. The current text foresees that the deadline can be expanded with another two months. Some delegations pointed out that a fixed deadline was important for reasons of predictability, so that the data subject would know when he or she can use his/her right of access. It should be noted that the Directive from 1995 uses the expression 'without excessive delay'.

Paragraph 4 states that the information provided should be free of charge unless requests are *manifestly unfounded or excessive*. At the meeting it was suggested to replace manifestly unfounded by *abusive*.

Delegations are asked to indicate whether they prefer to keep a fixed deadline and if so whether the one month suggested is a reasonable period or whether it should be extended or whether it is enough that the controller provides the information without undue delay.

As regards paragraph 4, delegations are asked to indicate whether they prefer the current wording or if they would like to replace 'manifestly unfounded' by 'abusive'.

Information to be provided where the data are collected from the data subject (Article 14)

At the latest DAPIX meeting some delegations suggested to add '*where appropriate*' or '*where practicable*' in paragraph 1 before listing the information the controller is obliged to provide at the time the data is obtained because it might not be possible to do so at that moment. However, such threshold would go below the level of protection under the 1995 Directive. Paragraph 5 of Article 17 restricts already the information requirement in a considerable way for many processing activities.

According to paragraph 1(b) the controller needs to provide information about the purposes of the processing. FR suggested to add *and of compatible further processing*.

Delegations are asked to indicate whether they would like to add 'where appropriate/practicable' in the first paragraph or whether they do not think that is necessary. As regards paragraph 1(b) delegations are asked to indicate whether a reference to compatible further processing should be added.

**Information to be provided where the data have not been obtained from the data subject
(Article 14a)**

Paragraph 4 sets out the exceptions to the obligation to provide information. At the DAPIX meeting some delegations asked to delete the last two points (d) and (e) from the list.

Delegations are asked to indicate whether they support the deletion of points (d) and (e) from the list of exceptions.

The right to be forgotten and erasure (Article 17)

The right to be forgotten is a new right in the Commission proposal. It elaborates on the right to erasure already set out in the 1995 Directive. At the DAPIX meeting on 24 March delegations asked about the relationship between the right to be forgotten and the right to erasure and the exact content of the right to be forgotten. They referred to the European Parliament that had deleted the reference to the right to be forgotten in the title of the Article and suggested that the Council could do the same since the added value of the right to be forgotten was unclear.

The FR delegation suggested to insert a point (f) with the following wording: 'the data have been collected when the data subject was minor' in order to strengthen the protection of children.

Delegations are asked to indicate whether they prefer to keep the reference to the right to be forgotten or whether they do like the European Parliament approach to delete it.

As regards the French suggestion, delegations are asked to indicate whether they can support such an addition.

The right to be forgotten (Article 17) dispute settlement

Following a general discussion on dispute settlement, the DE delegation put forward a suggestion for an Article 17c specifically for controllers operating an Internet search engine (6032/14). It involves the setting up of independent dispute settlements units by internet search engine operators. Creating new institutions of dispute settlement could give rise to different interpretations and interaction between this dispute settlement and basic regulation of duties of controllers. The Presidency considers that delegations should also take into account that such dispute settlement concerns the reconciliation of the right to the protection of personal data with the right of freedom of expression and information, which is - pursuant to Article 80- left to the national law of the Member States.

Delegations are requested to indicate whether they see the need for a specific dispute settlement for search engines in addition to the rights to lodge a complaint in Article 73 and 75.

Data portability (Article 18)

According to the current wording of Article 18 the data subject has the right to transmit personal data concerning him or her which he or she has provided to a controller to another controller under certain conditions. At the DAPIX meeting on 24 March 2015, delegations discussed whether this right also included an obligation for the controller to transmit the data or if the right only covered the right for the data subject to receive a copy of his or her data in a machine-readable format so that they could easily transmit the data to another controller, or as regards for example social media, no longer have their data posted on the site/withdraw the personal data initially transmitted.

The FR delegation provided wording for the idea of extending the scope to cover an obligation for the controller to transmit data as follows: "The data subject shall have the right to obtain from the controller the transmission of the personal data concerning belonging to him or her which he or she has provided to this controller to another controller in a commonly used and machine-readable format, through an easily accessible system, and without hindrance from the controller to which the data have been provided to, where ..."

The Commission explained that in its initial proposal the added value of this provision compared to the right of access in Article 15 was not only to receive a copy of the personal data in an electronic and structured format but also to provide a right for further use by the data subject by transmitting it to another controller.

Another issue that arose at the discussion was whether the right to portability which is already restricted to processing on the basis of consent or contract should also in these situations not apply to the public sector.

In light of the above, delegations are asked to indicate whether they see/understand the right to data portability as only a right to obtain a copy in a machine-readable format or whether it should also include an obligation for the controller to transmit the data to another controller or third party.

Delegations are asked to indicate whether they want to add that this right should not apply to processing when carried out by public authorities or bodies.

The right to object (Article 19)

The current text sets out that the data subject has the right to object the processing of personal data only when the processing is based on the legitimate interest of the controller (Article 6(1)(f)). This is a limitation compared to Article 14, point (a) of the 1995 Directive and the Commission proposal which guaranteed explicitly this right where the processing was necessary for the performance of a task carried out in the public interest (point e) of Article 6(1). At DAPIX on 24 March some delegations asked to extend the scope of this right and revert back to the Commission's proposal but only for processing based on the legitimate interests pursued by the controller.

The FR delegation suggested to insert a paragraph 2b providing stronger protection to object the processing of personal data for archiving purposes in the public interest or historical, statistical or scientific purposes. FR suggested the following wording: **"2b. Where personal data are processed on the basis of point (i) of Article 9(2), the data subject shall have the right to object at any time to the processing of personal data concerning him or her, unless the processing is necessary for the performance of a task carried out for reasons of public interest. This right shall be explicitly brought to the attention of the data subject and shall be presented clearly and separately from any other information and where an objection is upheld, the personal data shall no longer be processed."**

Delegations are asked to confirm if they want to keep the current text without a reference to point (e) of Article 6(1).

Delegations are also invited to indicate if they can accept the FR suggestion for a particular point on processing for archiving purposes in the public interest, or historical, statistical or scientific purposes.

Profiling (Article 20)

Profiling is a fundamental question in the Regulation. It has been discussed under many Presidencies, last under the Greek Presidency (10617/14). The current text was drafted at that stage but has not been discussed until the DAPIX meeting on 24 March 2015.

Delegations noted that the Article seemed to regulate decisions based on profiling rather than profiling as a technique in itself. Delegations cautioned not to go below the level of protection in Article 15 in the 1995 Directive. It is noted that the title of Article 15 in that Directive is *automated individual decisions*.

The European Parliament report sets out strongly in the first paragraph that every natural person has the right to object to profiling. The Parliament requires that profiles leading to measures producing legal effects concerning data subjects shall include human assessment. It further prohibits profiling if it has discriminatory effects.

Both profiling and profile appear in the Article on definitions as set out below.

(12a) 'profiling' means a form of automated processing of personal data intended to (...) use a profile 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;

(12b) 'profile' means a set of data characterising a category of individuals that is intended to be applied to a natural person;

Delegations are invited to indicate in the first place whether they want to regulate profiling as such or decisions based on automated processing. Delegations are also asked to indicate whether they think that the text or parts of the text adopted by the European Parliament in its report could serve as inspiration for the Council position.

Delegations are invited to indicate if they see the need to maintain these definitions and if so if the current wording is acceptable.

II. CHAPTER VIII

Right to lodge a complaint with a supervisory authority and Right to an effective judicial remedy against a supervisory authority (Articles 74 and 75)

Article 74 provides for the possibility of a judicial remedy against a supervisory authority at the court of the Member State where the supervisory authority is established. Article 75 provides for the right to a judicial remedy against a controller or processor. In such case the data subject has to lodge the complaint to a court of the Member State where the controller or processor has an establishment or where the data subject has his/her habitual residence.

Article 74 as amended is set out in the Annex.

Representation of data subjects (Article 76)

Delegations were quite concerned about paragraph 1a that allows for bodies, organisations or associations to lodge a complaint independently of a data subject's complaint and stated that such rights don't exist under national law.

Delegations are asked to indicate if they would like to allow such possibilities.

Suspension of proceedings (Article 76a)

Regulation No 1215/2012 (Brussels I recast Regulation) which contains inter alia rules on *lis pendens* and related actions, only applies in civil and commercial matters whatever the nature of the court or tribunal and its scope does not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)¹.

Therefore if no specific rule such as Article 76a is introduced in the draft Data Protection Regulation, some judicial remedies available under the draft Data Protection Regulation may be covered by the Brussels I recast Regulation (for example civil actions including compensation claims against controllers) while other judicial remedies such as judicial review of decisions taken by supervisory authorities would not fall within the scope of the Brussels I recast Regulation.

¹ Article 1(1)

Recital 118a clarifies that the draft Data Protection Regulation is *lex specialis* to the Brussels I recast Regulation. It means for example that Article 76a of the draft Data Protection Regulation which contains specific rules on suspension of proceedings will apply for all types of judicial remedies provided for in the draft Data Protection Regulation and that the rules on *lis pendens* and related actions contained in the Brussels I recast Regulation will not apply.

The relevant Article and recitals are set out in the Annex for reference.

Right to compensation and liability (Article 77)

The Presidency intends to focus on the responsibility between the controller and the processor and not other questions that have been raised under this Article. It has been pointed out that paragraphs 2 and 3 seem to be contradictory: either the controller and processor are jointly responsible or not.

Delegations are invited to indicate if they think that the controller and processor should be jointly responsible or if the data subject should in the first instance address the controller.

Penalties (Article 79b)

The Presidency suggests clarifying Member States' obligation to lay down rules on penalties to infringements of the Regulation. Article 79b(1) could read as follows: 'For infringements of this Regulation, in particular for infringements which are not subject to administrative fines pursuant to Article 79a, Member States shall lay down the rules on penalties applicable to such infringements and shall take all measures necessary to ensure that they are implemented (...). Such penalties shall be effective, proportionate and dissuasive.'

The accompanying recital (new 120a) could read: 'Where this Regulation does not harmonise administrative penalties or where necessary in other cases, for example in cases of serious infringements of this Regulation, Member States should implement effective, proportionate and dissuasive penalties. The nature of such penalties (criminal or administrative) should be determined by national law.'

This Article and the recital are also set out in the Annex.

Delegations are asked to indicate if they agree with the above wording in the Article and the recital.

- 118a) Where specific rules on jurisdiction are contained in this Regulation, in particular as regards proceedings seeking a judicial remedy including compensation, against a controller or processor, general jurisdiction rules such as those of Regulation No 1215/2012 should not prejudice the application of such specific rules².
- 119) Member States may lay down the rules on criminal sanctions for infringements of this Regulation, including for infringements of national rules adopted pursuant to and within the limits of this Regulation. These criminal sanctions may also allow for the deprivation of the profits obtained through infringements of this Regulation. However, the imposition of criminal sanctions for infringements of such national rules and of administrative sanctions should not lead to the breach of the principle of *ne bis in idem*, as interpreted by the Court of Justice.
- 120) In order to strengthen and harmonise administrative penalties against infringements of this Regulation, each supervisory authority should have the power to impose administrative fines. This Regulation should indicate offences, the upper limit and criteria for fixing the related administrative fines, which should be determined by the competent supervisory authority in each individual case, taking into account all relevant circumstances of the specific situation, with due regard in particular to the nature, gravity and duration of the breach and of its consequences and the measures taken to ensure compliance with the obligations under the Regulation and to prevent or mitigate the consequences of the infringement. The consistency mechanism may also be used to promote a consistent application of administrative sanctions. It should be for the Member States to determine whether and to which extent public authorities should be subject to administrative fines. Imposing an administrative fine or giving a warning does not affect the application of other powers of the supervisory authorities or of other sanctions under the Regulation.

² COM and DE scrutiny reservation.

120a) Where this Regulation does not harmonise administrative penalties or where necessary in other cases, for example in cases of serious infringements of this Regulation, Member States should implement effective, proportionate and dissuasive penalties. The nature of such penalties (criminal or administrative) should be determined by national law.

Article 74

Right to an effective judicial remedy against a supervisory authority³

1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them. (...)⁴.
2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to a judicial remedy where the supervisory authority competent in accordance with Article 51⁵ does not deal with a complaint or does not inform the data subject within three months or any shorter period provided under Union or Member State law⁶ on the progress or outcome of the complaint lodged under Article 73⁷.
3. Proceedings against a (...) supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established⁸.
- 3a. Where proceedings are brought against a decision of a supervisory authority which was preceded by an opinion or a decision of the European Data Protection Board in the consistency mechanism, the supervisory authority shall forward that opinion or decision to the court.
4. (...)
5. (...)⁹

³ ES, PT and SI reservation. EE, IT and UK scrutiny reservation.

⁴ DE, supported by IE and SE, suggested adding: 'by which it is adversely affected'.

⁵ COM reservation.

⁶ SI indicated that under its law the DPA was obliged to reply within two months.

⁷ SE scrutiny reservation. BE reservation. BE said that there was a link to Article 53 and the main establishment and the DPA of the habitual residence. Support from NL. IT thought that paragraphs 1 and 2 overlapped. NO wanted to delete paragraph 2 since a court review would endanger the independency of the DPA.

⁸ IT suggests stating that proceedings may be brought before the courts of the Member state where the natural or legal person has his/her habitual residence or is established.

⁹ COM reservation on deletion of paragraphs 4 and 5. DE scrutiny reservation on deletion of paragraphs 4 and 5.

Article 76a
Suspension of proceedings¹⁰

1. Where a competent court of a Member State has reasonable grounds to believe that proceedings concerning the same processing activities are pending in a court in another Member State, it shall¹¹ contact that court in the other Member State to confirm the existence of such proceedings.

2. Where proceedings involving the same processing activities are pending in a court in another Member State, any competent court other than the court first seized may suspend¹² its proceedings.

- 2a. Where these proceedings are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.¹³

¹⁰ AT, BE, DK, EE, ES, FI, FR, IT, NL, PL, PT, SE and SI scrutiny reservation. ES thought that *lis pendens* necessitated the same persons, same proceeding, same object of dispute and same claim and that that could be difficult to establish. UK, supported by FR, cautioned against having a too prescriptive text, support from FR SE thought that GDPR should not regulate *lis pendens*, instead it should be up to the DPA and MS courts to decide. For LU this was a question of judicial cooperation between judicial authorities. NO and FR asked how this text related to Regulation No 44/2001 and the Lugano Convention FI considered that it was necessary to have rules on this question in GDPR.

¹¹ LU supported by EL, suggested to replace "shall" with "may".

¹² NL and PL thought that it was difficult to force courts to stay proceedings waiting for another court to decide. NL asked how it was possible for a court to know that another case was going on elsewhere. COM thought that limitation to "same parties" was not appropriate here.

¹³ Based on Article 28 of Brussels I Regulation.

Article 79b

Penalties¹⁴

1. For infringements of this Regulation in particular for infringements which are not subject to administrative files pursuant to Article 79a, Member States shall¹⁵ lay down the rules on penalties applicable to such infringements and shall take all measures necessary to ensure that they are implemented (...). Such penalties shall be effective, proportionate and dissuasive.
2. (...).
3. Each Member State shall notify to the Commission those provisions of its law which it adopts pursuant to paragraph 1, by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them.

¹⁴ DE, DK, EE, ES, IT, PL and PT and SK scrutiny reservation. COM explained that infringements not listed in Article 79a were those under national law, referred to in Chapter IX, for example infringements in employment law and relating to freedom of expression. In that way Article 79b is complementary to the list in Article 79 and does not exclude other penalties. IT thought it was better to delete the Article but lay down the possibility to legislate at national level. FR reservation on the imposition of criminal penalties. DE in favour of referring *expressis verbis* to criminal penalties.

¹⁵ BE and EE reservation.