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NOTE

From:	Presidency
To:	JHA Counsellors (DAPIX)
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Subject:	Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) - Delegated and implementing acts

On 18/19 May 2105, the Data Protection Working Party (DAPIX) examined the question which delegated and implementing acts proposed by the Commission should be included in the Council text. In light of this examination, taking into account the reservations expressed by delegations on the relevant provisions, the Presidency suggests to maintain the following provisions:

- Delegated acts: Article 39a (7) is kept partially.
- Implementing acts: Article 26(2b), Article 38(4), Article 39a(8), Article 41(3), (3a) and (5), Article 42(2) and (5b), Article (43(4), Article 55(10) and Article 62(1)(d).

Given that delegations expressed no or minor support for the suggestion of FR to re-insert Article 31(6), Article 32(6) and Article 62(1a) and the suggestion of EE, NL to re-insert Article 30(4), the Presidency did not take up these suggestions.

129) In order to fulfil the objectives of this Regulation, namely to protect the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data and to ensure the free movement of personal data within the Union, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission. In particular, delegated acts should be adopted in respect of (...) ~~specifying the criteria and conditions in relation to the consent of a child;~~ (...); criteria and requirements for certification mechanisms; ~~criteria and requirements for transfers by way of binding corporate rules;~~ (...); ~~administrative sanctions;~~ (...) It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.

130) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission for: (...) ~~the right to data portability;~~ (...); **standard contractual clauses between controllers and processors and between processors, codes of conduct;** (...) technical standards and mechanisms for certification; the adequate level of protection afforded by a third country or a territory or a processing sector within that third country or an international organisation; adopt standard data protection clauses; formats and procedures for the exchange of information between controllers, processors and supervisory authorities for binding corporate rules; (...) mutual assistance; (...); the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers¹. In this context, the Commission should consider specific measures for micro, small and medium-sized enterprises.

¹ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13.

- 131) The examination procedure should be used for the adoption of implementing acts on **standard contractual clauses between controllers and processors and between processors**; codes of conduct; (...) technical standards and mechanisms for certification; the adequate level of protection afforded by a third country or a territory or a processing sector within that third country or an international organisation; **adopt standard data protection clauses**; formats and procedures for the exchange of information by electronic means between controllers, processors and supervisory authorities for binding corporate rules; ~~disclosures not authorized by Union law~~; mutual assistance; (...); **the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board** given that those acts are of general scope.
- 132) The Commission should adopt immediately applicable implementing acts where, in duly justified cases relating to a third country or a territory or a processing sector within that third country or an international organisation which does not ensure an adequate level of protection and relating to matters communicated by supervisory authorities under the consistency mechanism, imperative grounds of urgency so require.

Delegated acts

Article 8

Conditions applicable to child's consent in relation to information society services

- ~~3.— The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the methods to obtain verifiable consent referred to in paragraph 1(...)².~~

Article 39a

Certification body and procedure

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 86, for the purpose of (...) specifying the criteria and requirements to be taken into account for the data protection certification mechanisms referred to in paragraph 1, ~~including conditions for granting and revocation, and requirements for recognition of the certification and the requirements for a standardised 'European Data Protection Seal' within the Union and in third countries³.~~

² **BE, PT, LT: scrutiny reservation.**
DE, ES, FR, MT, SE, SI and UK suggested deleting this paragraph.

IE preferred EDPS guidelines.

DE, supported by BE, IE and FR, suggested giving the EDPB the power to issue guidelines in this regard. **FR suggested to accompany those guidelines if needed with implementing acts referred to in Article 38(4).**

³ CZ suggested adding "and for identifying that a service is offered directly to a child".

EE, IT, UK, SE, SI suggested to delete this paragraph

MT scrutiny reservation

FR, supported by IE, suggested to delete the phrase "including conditionsand in third countries."

Article 43

Binding corporate rules

~~3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for binding corporate rules within the meaning of this Article, in particular as regards the criteria for their approval, the application of points (b), (d), (e) and (f) of paragraph 2 to binding corporate rules adhered to by processors and on further necessary requirements to ensure the protection of personal data of the data subjects concerned.~~⁴

Article 79a

Administrative fines

~~4. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of adjusting the maximum amounts of the administrative fines referred to in paragraphs 1, 2 and 3 to monetary developments, taking into account the criteria referred to in paragraph 2a of Article 79.⁵~~

⁴ CZ, EE, ES, FR, IT, LT, SE, UK reservation.

MT, NL scrutiny reservation

FR scrutiny reservation regarding (public) archives. **FR requested clarification of the purpose of having implementing acts in the case of Article 43(3).** RO and HR thought the EDPB should be involved. PL and COM wanted to keep paragraph 3.

⁵ BE, CZ, DE, FR, IE, NL, RO, SI, UK reservation. NL considered **maximum amounts for administrative fines should be established by national legislator.** CZ wanted to delete the paragraph and thought that the DPA could set out the amounts.

PT scrutiny reservation.

Implementing acts⁶

Article 18

Right to data portability

- ~~3. — The Commission may specify (...) the technical standards, modalities and procedures for the transmission of personal data pursuant to paragraph 2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).⁷~~

Article 26

Processor

- 2b. The Commission may lay down standard contractual clauses for the matters referred to in paragraph 2 and 2a and in accordance with the examination procedure referred to in Article 87(2)⁸.

⁶ FR would not be against re-inserting Article 31(6), Article 32(6) and Article 62(1a). Cion supported this.

EE, NL, supported by Cion, suggested to re-insert Article 30(4). IE doubted whether it was possible to make broadly applicable rules given the amount of variables in the Article. In response, NL gave an example of such rules already applied in practice.

⁷ BE, DE, FR, HU, IE, NL, PT, SE and UK reservation.

RO scrutiny reservation

⁸ BE, IE, SI: reservation.

RO scrutiny reservation

PL was worried about a scenario in which the Commission would not act. CY and FR were opposed to conferring this role to COM (FR could possibly accept it for the EDPB).

Article 38

Codes of conduct

4. The Commission may adopt implementing acts for deciding that the approved codes of conduct and amendments or extensions to existing approved codes of conduct submitted to it pursuant to paragraph 3 have general validity within the Union. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 87(2).⁹

Article 39a

Certification body and procedure

8. The Commission may lay down technical standards for certification mechanisms and data protection seals and marks and mechanisms to promote and recognize certification mechanisms and data protection seals and marks. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 87(2)¹⁰.

⁹ **PT, RO: scrutiny reservation.**

¹⁰ DE pleaded in favour of deleting the last two paragraphs and suggested adding a new paragraph: "The previous paragraphs shall not affect provisions governing the responsibility of national certification bodies, the accreditation procedures and the specification of criteria for security and data protection. Commission's power to adopt acts pursuant to paragraphs 7 and 8 shall not apply to national and international certification procedures carried out on this basis. Security certificates issued by the responsible bodies or bodies accredited by them in the framework of these procedures shall be mutually recognized." ES also thought that this should not be left exclusively to the Commission.

Article 41

Transfers with an adequacy decision

3. The Commission, after assessing the adequacy¹¹ of the level of protection, may decide that a third country, or a territory or one or more specified sectors within that third country, or an international organisation ensures an adequate level of protection within the meaning of paragraph 2. (...) ¹². The implementing act shall specify its territorial and sectoral application and, where applicable, identify the (independent) supervisory authority(ies) mentioned in point (b) of paragraph 2. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 87(2)¹³.

¹¹ CZ, RO and SI reservation on giving such power to the Commission. DE thought that stakeholders should be involved in this process. NL and UK indicated that on this point the proposal seemed to indicate a shift from the 1995 Data Protection Directive, which put the responsibility for assessing a third country's data protection legislation in the first place with the controller who wanted to transfer personal data.

¹² CZ, DE, HR, IT, NL, PL, SK and RO thought an important role should be given to the EDPB in assessing these elements. COM has pointed out that there can be no additional step in the Comitology procedure, in order to be in line with the Treaties and Regulation 182/2011.

¹³ DE queried the follow-up to such decisions and warned against the danger that third countries benefiting from an adequacy decision might not continue to offer the same level of data protection. COM indicated there was monitoring of third countries for which an adequacy decision was taken.

- 3a. *Decisions adopted by the Commission on the basis of Article 25(6) (...) of Directive 95/46/EC shall remain in force until amended, replaced or repealed by the Commission¹⁴ in accordance with the examination procedure referred to in Article 87(2)¹⁵.*
5. The Commission may decide that a third country, or a territory or a specified sector within that third country, or an international organisation no longer ensures an adequate level of protection within the meaning of paragraph 2 and may, where necessary, repeal, amend or suspend such decision without retro-active effect. The implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2) or, in cases of extreme urgency (...), in accordance with the procedure referred to in Article 87(3)¹⁶. (...)

Article 42

Transfers by way of appropriate safeguards

2. The appropriate safeguards referred to in paragraph 1 may be provided for (...), without requiring any specific authorisation from a supervisory authority, by:
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- (b) standard data protection clauses adopted by the Commission (...) in accordance with the examination procedure referred to in Article 87(2)¹⁷; or
 - (c) standard data protection clauses adopted by a supervisory authority (...) and adopted by the Commission pursuant to the examination procedure referred to in Article 87(2).

¹⁴ Moved from paragraph 8. CZ and AT thought an absolute maximum time period should be set (sunset clause), to which COM was opposed. NL, PT and SI thought this paragraph 3a was superfluous or at least unclear. Also RO thought that, if maintained, it should be moved to the end of the Regulation.

¹⁵ DE and ES suggested to request the Board for an opinion. COM has pointed out that there can be no additional step in the Comitology procedure, in order to be in line with the Treaties and Regulation 182/2011. DE asked if a decision in paragraph 3a lasted forever. IE considered paragraph 3a providing necessary flexibility. CZ thought that new States should not be disadvantaged compared to those having received an adequacy decision under Directive 1995.

¹⁶ FR and UK suggested the EDPB give an opinion before COM decided to withdraw an adequacy decision.

¹⁷ FR reservation on the possibility for COM to adopt such standard clauses.

- 5b. *Authorisations by a Member State or supervisory authority on the basis of Article 26(2) of Directive 95/46/EC shall remain valid until amended, replaced or repealed by that supervisory authority¹⁸. Decisions adopted by the Commission on the basis of Article 26(4) of Directive 95/46/EC shall remain in force until amended, replaced or repealed by the Commission¹⁹ in accordance with the examination procedure referred to in Article 87(2)²⁰.*

Article 43

Binding corporate rules

4. The Commission may specify the format and procedures for the exchange of information (...) between controllers, processors and supervisory authorities for binding corporate rules within the meaning of this Article. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 87(2).

Article 55

Mutual assistance

10. The Commission may specify the format and procedures for mutual assistance referred to in this article and the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board, in particular the standardised format referred to in paragraph 6. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2)²¹.

¹⁸ UK and ES disagreed with the principle of subjecting non-standardised contracts to prior authorisation by DPAs. IT was thought that this was contrary to the principle of accountability. DE emphasised the need of monitoring.

¹⁹ AT thought an absolute time period should be set.

²⁰ DE and ES have suggested to request the Board for an opinion. COM has pointed out that there can be no additional step in the Comitology procedure, in order to be in line with the Treaties and Regulation 182/2011.

RO scrutiny reservation

²¹ **BE, DE, IT, EE, CZ, SI:** reservation.

RO: scrutiny reservation.

IE could accept EDPS guidelines only but could also accept implementing acts.

Article 62
Implementing acts

1. The Commission may adopt implementing acts of general scope for:
 - (a) (...)²²;
 - (b) (...);
 - (c) (...);
 - (d) specifying the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board, in particular the standardised format referred to in Article 57(5) and (6) and in Article 58(8).²³

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).

²² COM reservation on deletion.

²³ **BE, CZ, EE, NL, RO, SI: reservation. BE wanted EDPS guidelines.
IE could accept EDPS guidelines only but could also accept implementing acts.**

CHAPTER X

DELEGATED ACTS AND IMPLEMENTING ACTS²⁴

Article 86

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in (...) Article 8(3), Article 39a(7), [Article 43(3)], (...), Article 79a(4), shall be conferred on the Commission for an indeterminate period of time from the date of entry into force of this Regulation.
3. The delegation of power referred to in (...) Article 8(3), (...) Article 39a(7), [Article 43(3)], (...) Article 79a(4), (...) may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to (...) Article 8(3), (...) Article 39a(7), [~~Article 43(3)~~], (...), Article 79a(4) (...) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or the Council.

²⁴ COM reservation on the deletion of empowerments for delegated acts or implementing acts.

Article 87

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
 2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.
 3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.
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