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DAPIX 190  
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**NOTE**

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From: Presidency  
To: JHA Counsellors meeting (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)  
- Chapter II

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**Background**

1. Following the discussions at the DAPIX meeting of 5-6 February 2016, the Presidency has made a number of further changes to the text of Chapter II, which are highlighted in the annex in **bold underlined text**.

2. *Delegations are invited to discuss the below questions as well as the text set out in the Annex with a view to reaching a partial general approach on Chapter II at the Council meeting of 13 March 2014.*

## **Specific questions**

### ***Further processing***

3. Article 6, paragraphs 3a and 4, set out the regime for personal data that were initially processed for one purpose and subsequently processed for another purpose (further processing). There appears to be a fair amount of confusion surrounding the question whether the processing for further purposes requires a separate legal basis only in cases where these further purposes are incompatible with the initial purposes (*option a*) or also in case of compatible purposes (*option b*). The Presidency has redrafted recital 40 in order to clarify this. Option b implies that the rule set out in Article 6(2) does not do away with the requirement of a separate legal basis for archiving, historical, scientific and statistical purposes (but obviates the need for a separate collection of personal data for these purposes as they will always be deemed compatible with the initial purposes). Option b would also imply the deletion of the word "only" at the beginning of paragraph 4 of Article 6.

4. *Delegations are invited to indicate their preference for option a or b.*

5. A second source of confusion surrounding the issue of further processing is whether the legal basis for such processing could also be found in the legitimate interest of the controller. The Commission proposal did not allow for this, but many delegations appear to be in favour of allowing this (*option 1*). The German delegation has suggested an intermediate solution whereby the legitimate interest of the controller or a third party could only be relied upon to allow further processing if these interests override the interests of the data subject (*option 2*).

6. *Delegations are invited to indicate their preference for option 1 or 2.*

### ***Consent for children***

7. Article 8 sets out a particular regime for consent for children, which are defined as minors below the age of fourteen years old. A number of delegations have criticised this article, which requires that the consent be expressed by the parent, as being completely impossible to verify in practice and therefore impracticable. Some delegations have therefore pleaded in favour of deleting this article, but beefing up some rights of data subjects in the context of Chapter III. Other delegations have argued that, in particular in the light of very worrying phenomena such as cyberbullying, the Union should take a principled stance. Reference has also been made to US legislation in this regard.

8. *Therefore delegations are invited to indicate whether they want to:*
- *maintain this article (option 1);*
  - *delete it (option 2); or*
  - *delete it, combined with an understanding that some provisions in Chapter III will need to be amended to take account of the special situation of children (option 3).*

***International transfer of personal data of data concerning health***

9. Article 9 (4a) concerns the case of an international transfer of personal data of data concerning health based on the vital interest when the data subject is unable to provide consent. One delegation has proposed that such transfer should be subjected to the condition that those data 'will be processed by a health professional subject to the obligation of professional secrecy under the law of the third State concerned or equivalent rules'. Several delegations have opposed this proposal, indicating that this may lead to unacceptable situations where a data transfer will be - temporarily - blocked, whereas someone's vital interest, possible his or her life, is at stake.

- *Therefore delegations are invited to indicate whether they want to:*
- *maintain this paragraph (option 1);*
- *delete it (option 2); or*
- *move it to Chapter V (option 3).*

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.

[The principles of data protection should not apply to deceased persons, unless information on deceased persons is related to an identified or identifiable natural person<sup>1</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>1</sup> FR suggested this sentence be deleted.

- 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>2</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>3</sup>.

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<sup>2</sup> Further to DE proposal. FR and AT scrutiny reservation.

<sup>3</sup> DE reservation. ES, EE and IT also queried as regard the status of so-called identifiers. AT and SI thought the last sentence of the recital should be deleted. UK questioned whether so-called identifiers which were never used to trace back to a data subject should also be considered as personal data and hence subjected to the Regulation. It suggested stating that these can constitute personal data, but this will depend on the context. UK suggests deleting the words 'provided by their devices, applications, tools and protocols, such as Internet Protocol addresses or cookie identifiers' and 'received by the servers'. It also suggests deleting 'need not necessarily be considered as personal data in all circumstances' and replacing it by 'can constitute personal data, but this will depend on the context'. COM referred to the ECJ case law (Scarlett C-70/10) according to which IP addresses should be considered as personal data if they actually could lead to the identification of data subjects. DE queried who would in practice be responsible for such metadata.

23) 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 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>4</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. It is often not possible to fully identify the purpose of data processing for scientific purposes at the time of data collection. Therefore it is necessary to ensure that **processing is only lawful, when based on another legal ground, since the requirement of specific consent does not allow to cover as yet unknown issues, even when keeping with recognised ethical standards for scientific research**. 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>5</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.

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) or ribonucleic acid (RNA) analysis or analysis of any other element enabling equivalent information to be obtained.

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<sup>4</sup> AT reservation.

<sup>5</sup> IE scrutiny reservation; COM reservation.

- 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; 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.
- 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<sup>6</sup>. 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.

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<sup>6</sup> Obviously this recital may need to be amended in the context of future discussion on the one-stop-shop principle.

- 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.
- 29) Children [**below the age of fourteen years**] 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>7</sup>.
- 30) Any processing of personal data should be lawful and fair. (...) <sup>8</sup>. It should be transparent for the individuals that personal data concerning them are collected, used, consulted or otherwise processed and to which extent the data are processed or will be processed. The principle of transparency requires that any information and communication relating to the processing of those data should be easily accessible and easy to understand, and that clear and plain language is used. This concerns in particular the information of the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the individuals concerned and their right to get confirmation and communication of personal data being processed concerning them. Individuals should be made aware on risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise his or her rights in relation to the processing. In particular, the specific purposes for which the data are processed should be explicit and legitimate and determined at the time of the collection of the data. The data should be adequate and relevant (...) for the purposes for which the data are processed; this requires in particular ensuring that the data collected are not excessive and that the period for which the data are stored is limited to a strict minimum. (...). Personal data should only be processed if the purpose of the processing could not be fulfilled by other means. In order to ensure that the data are not kept longer than necessary, time limits should be established by the controller for erasure or for a periodic review <sup>9</sup>. Every reasonable step should be taken to ensure that personal data which are inaccurate are rectified or deleted. In order to ensure that the data are not kept longer than necessary, time limits should be established by the controller for erasure or for a periodic review. Personal data should be processed in a manner that ensures appropriate security and confidentiality of the personal data, including for preventing unauthorised access to or the use of personal data and the equipment used for the processing.

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<sup>7</sup> COM reservation on deletion of the reference to the UN Convention on the Rights of the Child.

<sup>8</sup> Deleted further to FR and NL scrutiny reservation and COM reservation.

<sup>9</sup> FR scrutiny reservation.



- 31) In order for processing to be lawful, personal data should be processed on the basis of the consent of the person concerned or some other legitimate legal basis laid down by law, either in this Regulation or in other Union or Member State law as referred to in this Regulation, including the necessity for compliance with the legal obligation to which the controller is subject or the necessity for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.
- 31a) Wherever this Regulation refers to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament, without prejudice to requirements pursuant the constitutional order of the Member State concerned, however such legal basis or legislative measure should be clear and precise and its application foreseeable for those subject to it as required by the case law of the Court of Justice of the European Union and the European Court on Human Rights.
- 32) Where processing is based on the data subject's consent, the controller should be able to demonstrate that the data subject has given the consent to the processing operation. In particular in the context of a written declaration on another matter, safeguards should ensure that the data subject is aware that, and the extent to which, consent is given. For consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended; consent should not be regarded as freely-given if the data subject has no genuine and free choice and is unable to refuse or withdraw consent without detriment.
- 33) (...)
- 34) In order to safeguard that consent has been freely-given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller and this imbalance makes it unlikely that consent was given freely in all the circumstances of that specific situation. [Consent is presumed not to be freely given, if it does not allow separate consent to be given to different data processing operations despite it is appropriate in the individual case, or if the performance of a contract is made dependent on the consent despite this is not necessary for such performance and the data subject cannot reasonably obtain equivalent services from another source without consent<sup>10</sup>.]

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<sup>10</sup> DE proposal.

- 35) Processing should be lawful where it is necessary in the context of a contract or the intended entering into a contract.
- 35a) This Regulation provides for general rules on data protection and that in specific cases Member States are also empowered to lay down national rules on data protection. The Regulation does therefore not exclude Member State law that defines the circumstances of specific processing situations, including determining more precisely the conditions under which processing of personal data is lawful. National law may also provide for special processing conditions for specific sectors and for the processing of special categories of data.
- 36) Where processing is carried out in compliance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority, the processing should have a (...) basis in Union law or in the national law of a Member State. (...). It should be also for Union or national law to determine the purpose of the processing. Furthermore, this (...) basis could specify the general conditions of the Regulation<sup>11</sup> governing the lawfulness of data processing, determine specifications for determining the controller, the type of data which are subject to the processing, the data subjects concerned, the entities to which the data may be disclosed, the purpose limitations, the storage period and other measures to ensure lawful and fair processing. It should also be for Union or national law to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public authority or another natural or legal person governed by public law, or by private law such as a professional association, where grounds of public interest so justify including for health purposes, such as public health and social protection and the management of health care services.
- 37) The processing of personal data should equally be regarded as lawful where it is necessary to protect an interest which is essential for the data subject's life or that of another person.

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<sup>11</sup> DK would prefer to delete "of the Regulation" and refer simply to the general conditions.

**37a) The basis for data processing which is necessary for a task carried out in the public interest should be provided for by Union or Member State law. Data processing may serve both important grounds of public interest and the vital interests of the data subject as, for instance when processing is necessary for monitoring epidemic and its spread or in situations of humanitarian emergencies, in particular in situations of natural disasters<sup>12</sup>.**

38) The legitimate interests of a controller including of a controller to which the data may be disclosed may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding. Legitimate interest could exist for example when there is a relevant and appropriate connection between the data subject and the controller in situations such as the data subject being a client or in the service of the controller<sup>13</sup>. (...) The presence of a legitimate interest would need careful assessment including whether a data subject can expect at the time and in the context of the collection of the data that processing for this purpose may take place. In particular such assessment must take into account whether the data subject is a child, given that children deserve specific protection. The data subject should have the right to object to the processing, on grounds relating to their particular situation and free of charge. To ensure transparency, the controller should be obliged to explicitly inform the data subject on the legitimate interests pursued and on the right to object, and also be obliged to document these legitimate interests. (...)

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<sup>12</sup> Further to DE proposal.  
<sup>13</sup> HU scrutiny reservation.

39) The processing of data to the extent strictly necessary for the purposes of ensuring network and information security, i.e. the ability of a network or an information system to resist, at a given level of confidence, accidental events or unlawful or malicious actions that compromise the availability, authenticity, integrity and confidentiality of stored or transmitted data, and the security of the related services offered by, or accessible via, these networks and systems, by public authorities, Computer Emergency Response Teams – CERTs, Computer Security Incident Response Teams – CSIRTs, providers of electronic communications networks and services and by providers of security technologies and services, constitutes a legitimate interest of the data controller *concerned*. This could, for example, include preventing unauthorised access to electronic communications networks and malicious code distribution and stopping ‘denial of service’ attacks and damage to computer and electronic communication systems. The processing of personal data strictly necessary for the purposes of preventing fraud also constitutes a legitimate interest of the data controller concerned. The processing of personal data for direct marketing purposes can be regarded as carried out for a legitimate interest.<sup>14</sup>

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<sup>14</sup> IT, AT and HU were opposed to the reference on direct marketing; DE thought it did not belong in this recital.

40) The processing of personal data for other purposes should be only allowed where the processing is compatible with those purposes for which the data have been initially collected, in which case no separate legal basis is required other than the one which allowed the collection of the data. (...) The further processing (...) for archiving purposes in the public interest or, statistical, scientific or historical (...) purposes (...) or in view of future dispute resolution (...) should (...) be considered as (...) compatible lawful processing operations. [The legal basis provided by Union or Member State law for the collection and processing of personal data may also provide a legal basis for further processing for other purposes if these purposes are in line with the assigned task and the controller is entitled legally to collect the data for these other purposes<sup>15</sup>]. In order to ascertain whether a purpose of further processing is compatible with the purpose for which the data are initially collected, the controller, after having met all the requirements for the lawfulness of the original processing, should take into account any link between those purposes and the purposes of the intended further processing, the context in which the data have been collected, including the reasonable expectations of the data subject as to their further use, the nature of the personal data, the consequences of the intended further processing for data subjects, and the existence of appropriate safeguards in both the original and intended processing operations. Where the intended other purpose is not compatible with the initial one for which the data are collected, the controller should obtain the consent of the data subject for this other purpose or should base the processing on another legitimate ground for lawful processing, in particular where provided by Union law or the law of the Member State to which the controller is subject. The provision is not intended to hinder legitimate business models such as direct marketing, debt collection or credit information services<sup>16</sup>. In any case, the application of the principles set out by this Regulation and in particular the information of the data subject on those other purposes should be ensured. (...). **Indicating possible criminal acts or threats to public security by the controller and transmitting these data to a competent authority should be regarded as being in the legitimate interest pursued by the controller<sup>17</sup>. However such transmission in the legitimate interest of the controller or** further processing of personal data should be prohibited if the processing is not compatible with a legal, professional or other binding obligation of secrecy.<sup>18</sup>

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<sup>15</sup> DE proposal. FR, IT and UK scrutiny reservation.

<sup>16</sup> FR and IT scrutiny reservation.

<sup>17</sup> DE proposal.

<sup>18</sup> UK queried the last sentence of recital 41, which was not reflected in the body of the text. DE, supported by GR, wanted it to be made clear that Article 6 did not hamper direct marketing or credit information services or businesses in general according to EL.

41) Personal data which are, by their nature, particularly sensitive (...) in relation to fundamental rights and freedoms, deserve specific protection as the context of their processing may create important risks for the fundamental rights and freedoms. These data should also include personal data revealing racial or ethnic origin, whereby the use of the term ‘racial origin’ in this Regulation does not imply an acceptance by the European Union of theories which attempt to determine the existence of separate human races. Such data should not be processed, unless processing is allowed in specific cases set out in this Regulation, bearing in mind that Member States are empowered to lay down national rules on data protection in order to adapt the application of the rules of this Regulation<sup>19</sup>. In addition to the specific requirements for such processing, the general principles and other rules of this Regulation should apply, in particular as regards the conditions for lawful processing. Derogations from the general prohibition for processing such special categories of personal data should be explicitly be provided **inter alia** where the data subject gives his or her explicit consent or in respect of specific needs, in particular where the processing is carried out in the course of legitimate activities by certain associations or foundations the purpose of which is to permit the exercise of fundamental freedoms. Member State and Union Law may provide that the general prohibition for processing such special categories of personal data in certain cases may not be lifted by the data subject’s explicit consent<sup>20</sup>.

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<sup>19</sup> Further to DK proposal.

<sup>20</sup> MT reservation on recitals 40 and 41.

42) Derogating from the prohibition on processing sensitive categories of data should also be allowed when provided for in Union or Member State law, and subject to suitable safeguards, so as to protect personal data and other fundamental rights, where (...) grounds of public interest so justify, in particular processing data for health security, monitoring and alert purposes, the prevention or control of communicable diseases and other serious (...) threats to health or ensuring high standards of quality and safety of health care and services and of medicinal products or medical devices or assessing public policies adopted in the field of health, also by producing quality and activity indicators. This may (...) be done for health purposes, including public health (...) and the management of health-care services, especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system, or for archiving in the public interest or historical, statistical and scientific (...) purposes.

A derogation should also allow processing of such data where necessary for the establishment, exercise or defence of legal claims, regardless of whether in a judicial procedure or whether in an administrative or any out-of-court procedure.

42a) Special categories of personal data which deserve higher protection, may only be processed for health-related purposes where necessary to achieve those purposes for the benefit of individuals and society as a whole, in particular in the context of the management of health-care services and systems including the processing by the management and central national health authorities of such data for the purpose of quality control, management information and the general national and local supervision of the health care system, and ensuring continuity of health-care and cross-border healthcare or health security, monitoring and alert purposes or for archiving, historical, statistical or scientific purposes as well as for studies conducted in the public interest in the area of public health. Therefore this Regulation should provide for harmonised conditions for the processing of special categories of personal data concerning health, in respect of specific needs, in particular where the processing of these data is carried out for certain health-related purposes by persons subject to a legal obligation of professional secrecy<sup>21</sup> (...). Union or Member State law should provide for specific and suitable measures so as to protect the fundamental rights and the personal data of individuals. (...)<sup>22</sup>.

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<sup>21</sup> UK preferred the term 'confidentiality', but this does not appear to be the correct term for professional secrecy imposed by legal or deontological rules.

<sup>22</sup> Moved from recitals 122.

- 42b) *The processing of special categories personal data (...) may be necessary for reasons of public interest in the areas of public health, without consent of the data subject. This processing is subject to for suitable and specific measures so as to protect the rights and freedoms of individuals. In that context, 'public health' should be interpreted as defined in Regulation (EC) No 1338/2008 of the European Parliament and of the Council of 16 December 2008 on Community statistics on public health and health and safety at work, meaning all elements related to health, namely health status, including morbidity and disability, the determinants having an effect on that health status, health care needs, resources allocated to health care, the provision of, and universal access to, health care as well as health care expenditure and financing, and the causes of mortality. Such processing of personal data concerning health for reasons of public interest should not result in personal data being processed for other purposes by third parties such as employers, insurance and banking companies<sup>23</sup>.*
- 43) Moreover, the processing of personal data by official authorities for achieving aims, laid down in constitutional law or international public law, of officially recognised religious associations is carried out on grounds of public interest.
- 44) Where in the course of electoral activities, the operation of the democratic system requires in a Member State that political parties compile data on people's political opinions, the processing of such data may be permitted for reasons of public interest, provided that appropriate safeguards are established.
- 45) If the data processed by a controller do not permit the controller to identify a natural person (...) the data controller should not be obliged to acquire additional information in order to identify the data subject for the sole purpose of complying with any provision of this Regulation. (...). However, the controller should not refuse to take additional information provided by the data subject in order to support the exercise of his or her rights.

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<sup>23</sup> Moved from recitals 123.



## HAVE ADOPTED THIS REGULATION:

### *Article 4*

#### *Definitions*

- (3b) 'pseudonymisation' means the processing of personal data by the controller 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 (...).

## CHAPTER II

### PRINCIPLES<sup>24</sup>

#### *Article 5*

#### *Principles relating to personal data processing<sup>25</sup>*

1. Personal data must be:
  - (a) processed lawfully, fairly and in a transparent manner in relation to the data subject<sup>26</sup>;

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<sup>24</sup> DE and SI scrutiny reservations.

<sup>25</sup> DE scrutiny reservation.

<sup>26</sup> DE proposed adding "and non-discriminatory" and "taking into account the benefit of data processing within a free, open and social society". This was viewed critically by several delegations (CZ, ES, IE, IT, NL, PL).

- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes; further processing of personal data for archiving purposes in the public interest or *scientific*, statistical or historical purposes shall in accordance with Article 83 not be considered incompatible with the initial purposes<sup>27</sup>;
- (c) adequate, relevant and not excessive in relation to the purposes for which they are processed (...)<sup>28</sup>;
- (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay;
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed (...); personal data may be stored for longer periods insofar as the data will be processed for archiving purposes in the public interest<sup>29</sup> or *scientific*, statistical, or historical purposes in accordance with Article 83 subject to implementation of the appropriate technical and organisational measures required by the Regulation in order to safeguard the rights and freedoms of data subject<sup>30</sup>;

<sup>27</sup> Referring to Article 6(2), DE and RO queried whether this phrase implied that a change of the purpose of processing was always lawful in case of scientific processing, also in the absence of consent by the data subject. BG thought that the second part of the sentence was redundant in view of Article 6(2). BE queried whether the concept of compatible purposes was still a useful one. HU and ES scrutiny reservations on reference to Article 83.

<sup>28</sup> COM reservation on the deletion of the data minimisation principle. AT, DE, EE, HU and SI preferred to return to the initial COM wording, stating 'limited to the minimum necessary'. DE also suggested adding: "they shall only be processed if, and as long as, the purposes could not be fulfilled by processing information that does not involve personal data".

<sup>29</sup> BE, supported by IE, suggested to insert a reference to Article 83. ES opposed the BE suggestion. COM meant that it was necessary to maintain the reference to *public interest* as well.

<sup>30</sup> NL and SK scrutiny reservation. SK indicated that the case of private archiving was still not addressed. BE and SE thought the last part of this sentence should be deleted.

(ee) processed in a manner that ensures appropriate security (...) of the personal data.

(f) (...)<sup>31</sup>

2. The controller shall be responsible for compliance with paragraph 1<sup>32</sup>.

#### Article 6

#### **Lawfulness of processing<sup>33</sup>**

1. Processing of personal data shall be lawful only if and to the extent that at least one of the following applies:

- (a) the data subject has given unambiguous<sup>34</sup> consent to the processing of their personal data for one or more specific purposes<sup>35</sup>;
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject;
- (d) processing is necessary in order to protect the vital interests of the data subject **or of another person**<sup>36</sup>;

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<sup>31</sup> AT wondered whether a principle of digital autonomy should be added here.

<sup>32</sup> It was previously proposed to add '*also in case of personal data being processed on its behalf by a processor*', but further to suggestion from FR, this rule on liability may be dealt with in the context of Chapter VIII. FR thought para. 2 in its entirety could be moved to this Chapter. DE, AT, PT, SI and SK scrutiny reservation.

<sup>34</sup> FR, PL and COM reservation in relation to the deletion of 'explicit' in the definition of 'consent'; UK thought that the addition of 'unambiguous' was unjustified.

<sup>35</sup> RO scrutiny reservation. UK suggested reverting to the definition of consent in Article 2(h) of the 1995 Directive.

<sup>36</sup> Further to BE and HU suggestion.

- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
  - (f) processing is necessary for the purposes of the legitimate interests<sup>37</sup> pursued by the controller or by a third party<sup>38</sup> except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. (...) <sup>39</sup> <sup>40</sup>.
2. Processing of personal data which is necessary for archiving purposes in the public interest, or for historical, statistical or scientific purposes shall be lawful subject also to the conditions and safeguards referred to in Article 83.
3. The basis for the processing referred to in points (c) and (e) of paragraph 1 must be established in accordance with:
- (a) Union law, or
  - (b) national law of the Member State to which the controller is subject.

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<sup>37</sup> FR scrutiny reservation.

<sup>38</sup> Reinstated at the request of BG, CZ, DE, ES, HU, IT, NL, PL, SE, SK and UK. COM, IE, FR and PL reservation on this reinstatement. IE said that the controller was a third party, in any case, neither a definition nor obligations for them had been introduced.

<sup>39</sup> Deleted at the request of BE, CZ, DK, IE, MT, SE, SI, SK, PT and UK. COM,GR and IT wanted to maintain the last sentence. FR scrutiny reservation. COM reservation against deletion of the last sentence, stressing that processing by public authorities in the exercise of their public duties should rely on the grounds in point c) and e).

<sup>40</sup> DK and FR regretted there was no longer a reference to purposes set out in Article 9(2) and thought that the link between Article 6 and 9 needed to be clarified. This was also stressed by BE, CZ, DK, ES, NL, and DE. BE suggested the following sentence: "The processing of special categories of data shall only be lawful to the extent that Article 9 is respected."

The purpose of the processing shall be determined in this legal basis or as regards the processing referred to in point (e) of paragraph 1, be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. This legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia the general conditions governing the lawfulness of data processing by the controller, the type of data which are subject to the processing, the data subjects concerned; the entities to, and the purposes for which the data may be disclosed; the purpose limitation; storage periods and processing operations and processing procedures, including measures to ensure lawful and fair processing, including for other specific processing situations as provided for in Chapter IX.

- 3a. In order to ascertain whether a purpose of further processing is compatible with the one for which the data are initially collected, the controller shall take into account, unless the data subject has given consent<sup>41</sup>, inter alia<sup>42</sup>:
- (a) any link between the purposes for which the data have been collected and the purposes of the intended further processing;
  - (b) the context in which the data have been collected;
  - (c) the nature of the personal data, in particular whether special categories of personal data, pursuant to Article 9;
  - (d) the possible consequences of the intended further processing for data subjects;
  - (e) the existence of appropriate safeguards<sup>43</sup>.

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<sup>41</sup> DK scrutiny reservation.

<sup>42</sup> DK, FI, NL, RO, SI and SE stressed the list should not be exhaustive. PT suggested adding consent. DE thought this paragraph should only be in the recital.

<sup>43</sup> BG, DE, SK and PL reservation: safeguards as such do not make further processing compatible. FR queried to which processing this criterion related: the initial or further processing.

## **OPTION 1**

4. [Only]<sup>44</sup> where the purpose of further processing is incompatible with the one for which the personal data have been collected, the further processing must have a legal basis at least in one of the grounds referred to in points (a) to (f)<sup>45</sup> of paragraph 1<sup>46 47</sup>.

## **OPTION 2**

4. [Only] where the purpose of further processing is incompatible with the one for which the personal data have been collected, the further processing must have a legal basis at least in one of the grounds referred to in points (a) to (e) of paragraph 1. Further processing for incompatible purposes on grounds of legitimate interests of the controller or a third party shall be lawful if these interests override the interests of the data subject.
5. (...)

### *Article 7*

#### ***Conditions for consent***

1. Where Article 6(1)(a) applies the controller shall be able to demonstrate that unambiguous<sup>48</sup> consent was given by the data subject.

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<sup>44</sup> HU and IT reservation on the word 'only'.

<sup>45</sup> (f) was added further to the request by DK, ES, FR, PL and NL and agreeable to BE, IE, HR and UK. COM, DE, FI, HU and IT pleaded for its deletion.

<sup>46</sup> ES, AT and PL reservation; DE, HU scrutiny reservation. BE queried whether this allowed for a hidden 'opt-in', e.g. regarding direct marketing operations, which COM referred to in recital 40. BE, supported by FR, suggested adding 'if the process concerns the data mentioned in Articles 8 and 9'.

<sup>47</sup> HU, supported by BG and SK, thought that a duty for the data controller to inform the data subject of a change of legal basis should be added here: 'Where personal data relating to the data subject are processed under this provision the controller shall inform the data subject according to Article 14 before the time of or within a reasonable period after the commencement of the first operation or set of operations performed upon the personal data for the purpose of further processing not compatible with the one for which the personal data have been collected.' FR and AT also underscored the importance of informing the data subject of such further processing.

<sup>48</sup> COM reservation related to the deletion of 'explicit' in the definition of consent.

- 1a. Where article 9(2)(a) applies, the controller shall be able to demonstrate that explicit consent was given by the data subject.
2. If the data subject's consent is to be given in the context of a written declaration which also concerns other matters, the request for consent must be presented in a manner which is clearly distinguishable (...) from the other matters, **in an intelligible and easily accessible form, using clear and plain language**<sup>49</sup>.
3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. **[Prior to giving consent, the data subject shall be informed thereof**<sup>50</sup>].
4. (...)

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<sup>49</sup> DE proposal.

<sup>50</sup> DE proposal.

Article 8

Conditions applicable to child's consent in relation to information society services<sup>51</sup>

1. Where Article 6 (1)(a) applies, in relation to the offering of information society services directly to a child<sup>52</sup>, the processing of personal data of a child below the age of 14 years<sup>53</sup> shall only be lawful if and to the extent that such consent is given or authorised by the holder of parental responsibility over the child. The controller shall make reasonable efforts to verify in such cases that consent is given or authorised by the holder of parental responsibility over the child, taking into consideration available technology.
  - 1a. (...) <sup>54</sup>.
2. Paragraph 1 shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child<sup>55</sup>.
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(...) <sup>56</sup>.

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<sup>51</sup> CZ, MT, SI and UK would prefer to see this Article deleted and SE, SK and PL could accept its deletion. IE saw the merit of a provision on child protection and referred to the US where a robust child protection on-line exists. FR, supported by CZ and PL, suggested deleting this Article and instead inserting particular provision for children when the Articles of the data subjects' rights were discussed, e.g. Article 20 on profiling.

<sup>52</sup> Several delegations (HU, ES, FR, SE, SK, PT) asked why the scope of this provision was restricted to the offering of information society services. COM clarified that this provision was also intended to cover the use of social networks, insofar as this was not governed by contract law. DE thought that this should be clarified. HU and FR thought the phrase 'in relation to the offering of information society services directly to a child' should be deleted.

<sup>53</sup> MT, AT, PT and SK support setting the age of consent at 18 years (age of majority). CZ preferred the age of 12 and FR could accept the age of 16.

<sup>54</sup> Deleted at the request of BG, CZ, DK, DE, IE, MT, SE and UK.

<sup>55</sup> DE, supported by SE, queried whether a Member State could adopt/maintain more stringent contract law. SI thought the reference should be worded more broadly to 'civil law', thus encompassing also personality rights.

<sup>56</sup> ES, FR and SE scrutiny reservation.



4. The Commission may lay down standard forms for specific methods to obtain verifiable consent referred to in paragraph 1. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2)]<sup>57</sup>.

*Article 9*

***Processing of special categories of personal data***<sup>58</sup>

1. The processing of personal data, revealing racial or ethnic origin, political opinions, religious or philosophical<sup>59</sup> beliefs, trade-union membership, and the processing of genetic data or data concerning health or sex life (...) shall be prohibited<sup>60</sup>.
2. Paragraph 1 shall not apply if one of the following applies and Article 6 is complied with:
- (a) the data subject has given explicit consent to the processing of those personal data (...), except where Union law or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject; or
- (b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject<sup>61</sup> in the field of employment **and social security and protection**<sup>62</sup> law in so far as it is authorised by Union law or Member State law or a collective agreement pursuant to Member State law providing for adequate safeguards<sup>63</sup>; or
- (c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving consent; or

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<sup>57</sup> LU reservation. ES, FR, SE and UK suggested deleting paragraphs 3 and 4.

<sup>58</sup> COM, DK, SE, AT and NL scrutiny reservation. SK thought the inclusion of biometric data should be considered.

<sup>59</sup> FR reservation: this term is too vague.

<sup>60</sup> FR would have preferred to state this in a positive manner.

<sup>61</sup> COM scrutiny reservation.

<sup>62</sup> BE proposal.

<sup>63</sup> DE asked for the deletion of the reference to collective agreement.

- (d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed outside that body without the consent of the data subjects; or
- (e) the processing relates to personal data which are manifestly made public<sup>64</sup> by the data subject; or
- (f) processing is necessary for the establishment, exercise or defence of legal claims<sup>65</sup>; or
- (g) processing is necessary for (...) reasons of public interest, on the basis of Union law or Member State law which shall provide for suitable and specific measures to safeguard the data subject's legitimate interests; or

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<sup>64</sup> DE, FR, SE and SI raised questions regarding the exact interpretation of the concept of manifestly made public (e.g. whether this also encompassed data implicitly made public and whether the test was an objective or a subjective one).

<sup>65</sup> COM, IE, PL and DE thought it should be clarified that also courts can process sensitive data.

<sup>66</sup> AT, PL and COM reservation on deletion of 'important'; DK suggested adding 'in the public interest vested in the controller.

(h) processing<sup>67</sup> is necessary for the purposes of preventive or occupational medicine<sup>68</sup>, for the assessment of the working capacity of the employee<sup>69</sup>, medical diagnosis, the provision of (...) <sup>70</sup> care or treatment or the management of health-care systems and services (...) on the basis of Union law or Member State law <sup>71</sup> or pursuant to contract to which the data subject is party<sup>72</sup> and subject to the conditions and safeguards referred to in paragraph 4<sup>73</sup>;

(ha) *processing of genetic data is necessary for purposes specified in points c), f), g), h) and hb) of this paragraph on the basis of Union or Member State law<sup>74</sup> and subject to the conditions and safeguards referred to in paragraph 4;*<sup>75</sup>

(hb) *processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union law or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject data;*

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<sup>67</sup> HU suggested reinstating "of health data" here and in point (hb).

<sup>68</sup> AT would like to see this deleted; BE pointed out this type of medicine practice is not (entirely) regulated by law under Belgian law and therefore the requirement of paragraph 4 is not met.

<sup>69</sup> AT would like to see this deleted; EE scrutiny reservation.

<sup>70</sup> Deleted at the suggestion of UK with reference to the parctical difficulty of distinguish health care from social care.

<sup>71</sup> COM, IE, PL scrutiny reservation.

<sup>72</sup> FR scrutiny reservation.

<sup>73</sup> AT, DE and EE, ES scrutiny reservation. DE and ES queried what happened in cases where obtaining consent was not possible (e.g. in case of contagious diseases; persons who were physically or mentally not able to provide consent); NL thought this should be further clarified in recital 42. BE queried what happened in the case of processing of health data by insurance companies. COM explained that this was covered by Article 9(2) (a), but SI was not convinced thereof.

<sup>74</sup> FR and IE reservation (IE remarked this did not cover the use these data for the purpose of establishing paternity); FR and SI wanted to deleted this point in its entirety. NL, RO and UK wanted to include also criminal purposes (*'the performance of a task carried out by competent authorities on the basis of Union or Member State law for the purpose of prevention, investigation, detection or prosecution of criminal offences'*), but the Presidency thinks this is covered by the draft Directive. Should this not be the case, this point would indeed need to be amended.

<sup>75</sup> UK concerned this may restrict processing of data used for medical research.

(i) processing is necessary for archiving purposes in the public interest or historical, statistical or scientific (...) purposes and subject to the conditions and safeguards referred to in Article 83 (...)<sup>76</sup>;

(j) (...)<sup>77</sup>

3. (...)<sup>78</sup>

4. Personal data referred to in paragraph 1 may on the basis of Union or Member State law be processed for the purposes referred to in points (h) and (ha) of paragraph 2 when (...) those data are processed by or under the responsibility<sup>79</sup> of a (...) professional subject to the obligation of professional secrecy<sup>80</sup> under Union or Member State law or rules established by national competent bodies; by another person also subject to an (...) obligation of secrecy under Member State law or rules established by national competent bodies (...).

[4a. In case a transfer of personal data referred to Article 44(1)(f) involves personal data concerning health such transfer can take place only subject to the condition that those data will be processed by a health professional subject to the obligation of professional secrecy under the law of the third State concerned or rules established by national competent bodies to the obligation of professional secrecy, or by another person also subject to an (...) obligation of secrecy under the law of the third State concerned or rules established by national competent bodies<sup>81</sup>].

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<sup>76</sup> The Presidency is of the opinion that when processing necessary for medical research, including studies conducted in the public interest in the area of public health, are covered by the concept of scientific purposes in Article 83 (and to the extent that would not be the case, should be covered by point (hb)). COM found that point (i) as regards health-related purposes was unclear and asked to explain further in a recital. COM wished that the substance of former Article 81 was maintained.

<sup>77</sup> Deleted at the request of AT, BE, COM, EE, ES, FR, HU, IT, LU, MT, PL, PT and SK.

<sup>78</sup> COM reservation on the deletion of paragraph 3 on delegated acts.

<sup>79</sup> ES asked for the deletion of the terms 'under the responsibility of'.

<sup>80</sup> See clarification of the term professional secrecy in recital 122. PL would have preferred to refer to legal obligations, but some of the may not be laid down in (statutory) law. RO on the contrary thought it sufficient to refer to 'rules established by national competent bodies in the field of professional secrecy'. IE reservation on this paragraph.

<sup>81</sup> COM, CZ, DK, IE, NL, PT and FI reservation: they thought this could be deleted.; BE, AT, PL and UK scrutiny reservation. FR, supported by SK, proposed also to add an obligation of pseudonymisation. EE, NL, FI and COM thought that, if kept, this should be regulated in Chapter V.

## Article 9a

### **Processing of data relating to criminal convictions and offences**

Processing of data relating to criminal convictions and offences or related security measures based on Article 6(1) may only be carried out either under the control of official authority (...) or when the processing is (...) authorised by Union law or Member State law providing for adequate safeguards for the rights and freedoms of data subjects. A complete register of criminal convictions may be kept only under the control of official authority<sup>82</sup>.

## Article 10

### **Processing not requiring identification**

1. If the purposes for which a controller processes personal data do not require the identification of a data subject by the controller, the controller shall not be obliged to acquire (...) additional information nor to engage in additional processing in order to identify the data subject for the sole purpose of complying with (...) this Regulation<sup>83</sup>.
2. Where, in such cases the controller is not in a position to identify the data subject, articles 15, 16, 17, 17a, 17b and 18 do not apply except where the data subject, for the purpose of exercising his or her rights under these articles, provides additional information enabling his or her identification<sup>84</sup>.

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<sup>82</sup> SI, SK and UK reservation on last sentence.

<sup>83</sup> AT, DE, FR, HU and UK scrutiny reservation.

<sup>84</sup> DK, FR, NL, RO, SE and SI scrutiny reservation; COM reservation. BE thought this paragraph could also be moved to a recital.