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**NOTE**

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From:	Presidency
To:	Permanent Representatives Committee
No. prev. doc.:	8835/15
Subject:	Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) - Article 6 and recital 40 in Chapter II and Chapter III

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**Introduction**

The Commission adopted on 25 January 2012 a comprehensive data protection package comprising of:

- abovementioned proposal for a General Data Protection Regulation, which is intended to replace the 1995 Data Protection Directive (former first pillar);
- a proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, which is intended to replace the 2008 Data Protection Framework Decision (former third pillar).

The aim of the General Data Protection Regulation is to enhance data protection rights of individuals and facilitate the free flow of personal data in the digital single market.

The European Parliament adopted first reading on the proposals for the data protection Regulation and Directive on 12 March 2014.

The Council gave priority on achieving progress on the General Data Protection Regulation finding agreement on several partial general approaches between June 2014 and March 2015<sup>1</sup>.

In the context of the Presidency's aim to find a General Approach in the June Justice and Home Affairs Council on the regulation in its entirety, the Presidency submits to the Permanent Representatives Committee for endorsement a compromise text on Chapter III on Rights of the data subject<sup>2</sup>. The Presidency has prepared this compromise text in light of the discussions in the Committee on 29 April and in the Data Protection Working Party (DAPIX) on 18/19 May.

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<sup>1</sup> A first partial general approach (PGA) was reached on Chapters V (international transfers of data) in June 2014 with other PGAs on Chapter IV (obligations of companies) in October 2014, on the overarching question of the public sector and Chapter IX (Specific data protection situations) in December 2014 and on the One-stop-shop mechanism (Chapters VI and VII) in March 2015.

<sup>2</sup> The relevant articles are Article 4(12a), Articles 11 -21, recitals 46 - 58a.

## **Presidency compromise suggestion**

### Chapter II, Article 6 and recital (40)

During the discussions at the DAPIX meeting on 18/19 May 2015 concerning the relationship between Chapters II and IX there appeared to be a strong consensus that the partial general approaches regarding both Chapters reached in the Justice and Home Affairs Council of March 2015 should not be unravelled. Therefore, the Presidency reverts to the text of the partial general approach of Article 6 and recital (40) suggesting as only change the insertion of "inter alia" in the introductory part of Article 6 (3a). This insertion clarifies that the list of criteria for ascertaining whether a purpose of further processing is compatible with the one for which the data are initially collected is not exhaustive. The Presidency compromise text for Article 6 appears in Annex I.

### Chapter III

In drawing up a new overall compromise suggestion for Chapter III, the Presidency has taken as a starting point that the protection level of the new General Data Protection Regulation must not be lower than the level currently ensured by Directive 95/46. Lowering the protection level would breach Article 53 of the Charter (non-regression clause) and Article 8 of the Charter as interpreted by the European Court of Justice which only accepts strict, justified and foreseeable limitations to the fundamental right to data protection.

Furthermore, in drawing up the overall compromise text, the Presidency aimed at striking a balance between enhancing protection of data subjects, providing a data protection framework that enables business development and innovation and avoiding unnecessary administrative burden.

The new suggestions compared to document 8835/15 which appear in Annex I and Annex II are marked in **bold**.

Amongst the suggestions for change, the Presidency notes in particular two important issues.

*Right to erasure and "to be forgotten" (Article 17, paragraph 1a)*

The Presidency makes a suggestion to amend Article 17 with the aim to provide more protection to children. To do so, firstly, the Presidency leaves unchanged the introductory part of paragraph 1 which refers to the right of data subjects to have their personal data erased without undue delay, especially when this data was collected when the data subject was a child. Secondly, the Presidency suggests a new paragraph 1a which specifies the right to obtain from the controller the erasure of personal data, without undue delay, if the data have been collected in relation to the offering of information society services referred to in Article 8(1). The reference to Article 8(1) implies that this right concerns the processing of personal data of a child.

*Right to object (Article 19(2aa))*

Paragraph 1 of Article 19 provides that the data subject has, under certain conditions, a right to object to processing of data concerning him or her. The Presidency aims to find a balance between, on the one hand, the right of the data subject to object to such processing, and on the other hand, burden for controllers. Against that background, the Presidency suggests in paragraph 2aa a specific regime for personal data that are processed for historical, statistical or scientific purposes. In these cases, the data subject has the right to object to processing personal data concerning him or her, unless the processing is necessary for the performance of a task carried out in the public interest or for compliance with a legal obligation to which the controller is subject.

The Presidency compromise text for Chapter III appears in Annex II.

## Conclusion

Subject to the understanding on the basis of which Council reached agreements on the partial general approaches<sup>3</sup>, the Committee is invited to endorse the Presidency compromise text on Article 6 and recital (40) of Chapter II as it appears in Annex I and the text of Chapter III as it appears in Annex II with a view to enabling the Justice and Home Affairs Council to adopt a General Approach on the entire General Data Protection Regulation on 15 June 2015.

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<sup>3</sup> The partial general approaches are based on the understanding that:

- nothing is agreed until everything is agreed and future changes to be made to the text of the provisionally agreed Articles to ensure the overall coherence of the Regulation are not excluded;
- such partial general approaches are without prejudice to any horizontal question; and
- such partial general approaches do not mandate the Presidency to engage in informal trilogues with the European Parliament on the text.

40. The processing of personal data for other purposes than the purposes for which the data have been initially collected should be only allowed where the processing is compatible with those purposes for which the data have been initially collected. In such case no separate legal basis is required other than the one which allowed the collection of the data . (...) If the 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, Union law or Member State law may determine and specify the tasks and purposes for which the further processing shall be regarded as lawful. The further processing (...) for archiving purposes in the public interest or, statistical, scientific or historical (...) purposes (...) or in view of future dispute resolution<sup>4</sup> 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>5</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. (...).

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<sup>4</sup> ES pointed out the text of Article 6 had not been modified regarding dispute resolution.

<sup>5</sup> FR, IT and UK scrutiny reservation.

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 and on his or her rights (...) including the right to object, 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>6</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>7</sup>

#### *Article 6*

#### ***Lawfulness of processing***<sup>8</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>9</sup> consent to the processing of their personal data for one or more specific purposes<sup>10</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;

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<sup>6</sup> AT, PL and COM reservation.

<sup>7</sup> IE, SE and UK queried the last sentence of recital 40, which was not reflected in the body of the text. DE, supported by CZ, IE, GR and PL, wanted it to be made clear that Article 6 did not hamper direct marketing or credit information services or businesses in general according to GR.

<sup>8</sup> DE, AT, PT, SI and SK scrutiny reservation.

<sup>9</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>10</sup> RO scrutiny reservation.

- (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;
  - (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>11</sup> pursued by the controller or by a third party<sup>12</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>13 14</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.

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<sup>11</sup> FR scrutiny reservation.

<sup>12</sup> Reinstated at the request of BG, CZ, DE, ES, HU, IT, NL, SE, SK and UK. COM, IE, FR and PL reservation on this reinstatement.

<sup>13</sup> Deleted at the request of BE, CZ, DK, IE, MT, SE, SI, SK, PT and UK. COM, AT, CY, DE, FI, FR, GR and IT wanted to maintain the last sentence. 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>14</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.



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<sup>15</sup>.

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.

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<sup>15</sup> It was pointed out that the text of Article 6 may have an adverse effect on the collection of personal data under administrative, criminal and civil law collections by third country public authorities, in that Article 6 provides that processing for compliance with a legal obligation to which the controller is subject or for the performance of a task carried out in the public interest may only take place to the extent established in accordance with Union or Member State law. Compliance with the administrative, regulatory, civil and criminal law requirements of a third country incumbent on controllers that engage in commercial or other regulated activities with respect to third countries, or voluntary reporting of violations of law to, or cooperation with, third country administrative, regulatory, civil and criminal law enforcement authorities appear not be allowed under the current draft of Article 6 . The Presidency thinks this point will have to be examined in the future, notably in the context of Chapter I.

- 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>16</sup>, inter alia<sup>17</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 are processed, pursuant to Article 9;
  - (d) the possible consequences of the intended further processing for data subjects;
  - (e) the existence of appropriate safeguards<sup>18</sup>.
4. Where the purpose of further processing is incompatible with the one for which the personal data have been collected by the same controller, 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<sup>19 20</sup>. Further processing by the same controller for incompatible purposes on grounds of legitimate interests of that controller or a third party shall be lawful if these interests override the interests of the data subject<sup>21</sup>.

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<sup>16</sup> DK, IT and PT scrutiny reservation; IT deemed this irrelevant to compatibility test.

<sup>17</sup> DE, DK, EE, FI, IE, NL, RO, SI, SE and COM stressed the list should not be exhaustive.

<sup>18</sup> 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. DE and UK pleaded for the deletion of paragraph 3a.

<sup>19</sup> ES, AT and PL reservation; DE, HU scrutiny reservation. FR suggested adding 'if the process concerns the data mentioned in Articles 8 and 9'.

<sup>20</sup> HU, supported by CY, FR, AT 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. The Presidency refers to the changes proposed in ADD 1 to 17072/3/14 REV 3.

<sup>21</sup> COM reservation; BE, AT, FI, HU, IT and PL scrutiny reservation: (some of) these delegations would have liked to delete this last sentence; DE wanted to limit the second sentence to private controllers.

- 23a) ~~The principles of data protection should not apply to data of deceased persons., unless information on deceased persons is related to an identified or identifiable natural person.~~ However, ~~the~~ **The** national law of a Member State ~~or Union~~ may provide for rules ~~regarding of data protection also to the processing of~~ data of ~~the~~ deceased persons.
- 46) <sup>22</sup>The principle of transparency requires that any information addressed to the public or to the data subject should be easily accessible and easy to understand, and that clear and plain language and, additionally, where appropriate, visualisation is used. This information could be provided also in electronic form, for example, when addressed to the public, through a website. This is in particular relevant where in situations, such as online advertising, the proliferation of actors and the technological complexity of practice makes it difficult for the data subject to know and understand if personal data relating to them are being collected, by whom and for what purpose. Given that children deserve specific protection, any information and communication, where processing is addressed (...) to a child, should be in such a clear and plain language that the child can easily understand.
- 47) Modalities should be provided for facilitating the data subject's exercise of their rights provided by this Regulation, including mechanisms to request, (...) in particular access to data, rectification, erasure and to exercise the right to object. Thus the controller should also provide means for requests to be made electronically, especially where personal data are processed by electronic means. The controller should be obliged to respond to requests of the data subject without undue delay and at the latest within a fixed deadline of one month and give reasons where the controller does not intend to comply with the data subject's request.

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<sup>22</sup> DE suggestion (8089/15) partly taken over.

However, if requests are manifestly unfounded or excessive<sup>23</sup> such as when the data subject unreasonably and<sup>24</sup> repetitiously requests information or where the data subject abuses its right to receive information for example by providing false or misleading information when making the request, the controller could<sup>25</sup> refuse to act on the request.<sup>26</sup>

- 48) <sup>27</sup>The principles of fair and transparent processing require that the data subject should be informed (...) of the existence of the processing operation and its purposes (...). The controller should provide the data subject with any further information necessary to guarantee fair and transparent processing. Furthermore the data subject should be informed about the existence of profiling, and the consequences of such profiling. Where the data are collected from the data subject, the data subject should also be informed whether they are obliged to provide the data and of the consequences, in cases they do not provide such data.

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<sup>23</sup> Cion suggestion. As in Article 12(4).

<sup>24</sup> CZ suggested or instead of "and".

<sup>25</sup> PT suggested instead "may".

<sup>26</sup> AT suggested to delete the last sentence as repetitiously requesting information must not as such be considered that the request is manifestly unfounded. Alternatively, AT suggested "However, if requests are manifestly unfounded such as when the data subject repetitiously requests information despite complete and correct information or despite properly substantiated denial of information or well-founded restriction of information by the controller or where the data subject abuses its right to receive information for example by providing false or misleading information when making the request, the controller could refuse to act on the request."

AT: scrutiny reservation on "abuses its right".

<sup>27</sup> AT suggested "shall" instead of "should" throughout recital (48).

- 49) The information in relation to the processing of personal data relating to the data subject should be given to them at the time of collection, or, where the data are not collected from the data subject, within a reasonable period, depending on the circumstances of the case. Where data can be legitimately disclosed to another recipient, the data subject should be informed when the data are first disclosed to the recipient. Where the controller intends to process the data for a purpose other than the one for which the data were collected the controller should<sup>28</sup> provide the data subject prior to that further processing with information on that other purpose and other necessary information<sup>29</sup>. Where the origin of the data could not be provided to the data subject because various sources have been used, the information should be provided in a general manner.
- 50) However, it is not necessary to impose this obligation where the data subject already possesses this information, or where the recording or disclosure of the data is expressly laid down by law, or where the provision of information to the data subject proves impossible or would involve disproportionate efforts. The latter could be particularly the case where processing is for historical, statistical or scientific (...) purposes; in this regard, the number of data subjects, the age of the data, and any appropriate safeguards adopted may be taken into consideration.

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<sup>28</sup> AT suggested "shall" instead of "should".

<sup>29</sup> NL suggested to insert "in an appropriate manner" with a view to alleviating concerns of business. IE considered this sentence burdensome, in particular in case the other purpose is compatible with the initial purpose.

- 51) A natural person should have the right of access to data which has been collected concerning him or her, and to exercise this right easily and at reasonable intervals, in order to be aware of and verify the lawfulness of the processing. *This includes the right for individuals to have access to their<sup>30</sup> personal data concerning their health, for example the data in their medical records containing such information as diagnosis, examination results, assessments by treating physicians and any treatment or interventions provided.* Every data subject should therefore have the right to know and obtain communication in particular for what purposes the data are processed, where possible for what period, which recipients receive the data, what is the logic involved in any automatic data processing and what might be, at least when based on profiling, the consequences of such processing. This right should not adversely affect the rights and freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software. However, the result of these considerations should not be that all information is refused to the data subject. Where the controller processes a large quantity of information concerning the data subject, the controller may request that before the information is delivered the data subject specify to which information or to which processing activities the request relates.
- 52) The controller should use all reasonable measures to verify the identity of a data subject who requests access, in particular in the context of online services and online identifiers. (...) **Identification may include the digital identification of digital data subject, for example through a log-in or an e-mail address, besides the identification of a physical person<sup>31</sup>.** A controller should not retain personal data for the sole purpose of being able to react to potential requests.

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<sup>30</sup> FR suggested to insert "login data and to their".

<sup>31</sup> Presidency suggestion to ensure identification in digital era.

53) A natural person should have the right to have personal data concerning them rectified and a 'right to be forgotten' where the retention of such data is not in compliance with this Regulation or with Union or Member State law to which the controller is subject. In particular, data subjects should have the right that their personal data are erased and no longer processed, where the data are no longer necessary in relation to the purposes for which the data are collected or otherwise processed, where data subjects have withdrawn their consent for processing or where they object to the processing of personal data concerning them or where the processing of their personal data otherwise does not comply with this Regulation. This right is in particular relevant, when the data subject has given their consent as a child, when not being fully aware of the risks involved by the processing, and later wants to remove such personal data especially on the Internet<sup>32</sup>. The data subject should be able to exercise this right notwithstanding the fact that he or she is no longer a child. However, the further retention of the data should be lawful<sup>33</sup> where it is necessary for *exercising the right of freedom of expression and information, for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, for reasons of public interest in the area of public health, for archiving purposes in the public interest, for historical, statistical and scientific (...) purposes or for the establishment, exercise or defence of legal claims.*<sup>34</sup>

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<sup>32</sup> Inspired by FR suggestion, supported by HU, SI, to strengthen the rights of children as follows: This right should be exercised notwithstanding the fact that the data subject is no longer a child.

<sup>33</sup> DE suggestion.

<sup>34</sup> NL considered that recital (53a) could be deleted as it is covered by recital (54a). PL made a suggestion for an alternative text of recital (53a) (7586/15 REV1).

54) To strengthen the 'right to be forgotten' in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform the controllers<sup>35</sup> who are processing such data (...) to erase any links to, or copies or replications of that personal data. ~~**The controller should inform other controllers whose identity was known to the controller that made the personal data public at the time it was made public. It should also only extend to controllers which fall into that category who were deliberately and intentionally provided with the data by the controller which made the data public**~~<sup>36</sup>.

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<sup>35</sup> PL and UK found that as regards *known controller* the text should be drafted tighter. HU preferred to delete *known*.

AT, DE: reservation considering "known" too narrow given the dynamism of the digital world. DE suggested to delete "known".

Cion wanted "known" to be deleted.

<sup>36</sup> UK suggestion supported by FR.

DE suggested to delete the sentences "A known ... data public".



To ensure the above<sup>37</sup> mentioned information, the controller should take (...) reasonable steps, taking into account available technology and the means available to the controller, including technical measures, in relation to data for the publication of which the controller is responsible. (...).

54a) Methods to restrict processing of personal data could include, inter alia, temporarily moving the selected data to another processing system or making the selected data unavailable to users or temporarily removing published data from a website. In automated filing systems the restriction of processing of personal data should in principle be ensured by technical means; the fact that the processing of personal data is restricted should be indicated in the system in such a way that it is clear that the processing of the personal data is restricted.<sup>38</sup>

55) To further strengthen the control over their own data (...), where the processing of personal data is carried out by automated means, the data subject should also be allowed to receive the personal data concerning him or her **and any other relevant information**, which he or she has provided to a controller, in a structured and commonly used and machine-readable format and transmit it to another controller.

This right should apply where the data subject provided the personal data based on his or her consent or in the performance of a contract. It should not apply where processing is based on another legal ground other than consent or contract. By its very nature this right should not be exercised against controllers processing data in the exercise of their public duties. It should therefore in particular not apply where processing of the personal data is necessary for compliance with a legal obligation to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of an official authority vested in the controller.

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<sup>37</sup> DE suggested "the above" instead of "this".

<sup>38</sup> HR wanted to make a reference to cyber bullying.

Where, in a certain set of personal data, more than one data subject is concerned, the right to transmit the data should be without prejudice to the requirements on the lawfulness of the processing of personal data related to another data subject in accordance with this Regulation.

<sup>39</sup>This right should also not prejudice the right of the data subject to obtain the erasure of personal data and the limitations of that right as set out in this Regulation and should in particular not imply the erasure of personal data concerning the data subject which have been provided by him or her for the performance of a contract, to the extent and as long as the data are necessary for the performance of that contract. (...)

56) <sup>40</sup>In cases where personal data might lawfully be processed (...) **because 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 or** on grounds of (...) the legitimate interests of a controller **or a third party**, any data subject should nevertheless be entitled to object to the processing of any data relating to **their particular situation** ~~them~~. It should be for the controller to demonstrate that their **compelling** legitimate interests may override the interests or the fundamental rights and freedoms of the data subject.

57) Where personal data are processed for the purposes of direct marketing, the data subject should have the right to object to such processing, **whether initial or further processing**, free of charge and in a manner that can be easily and effectively invoked.

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<sup>39</sup> FR suggested to delete the first sentence of this subparagraph. In reaction, Pres explained that recital 55 was narrower than right to access because it concerned right to data portability.

<sup>40</sup> Presidency suggestion to bring recital (56) in line with Article 19(1).

58) The data subject should have the right not to be subject to a decision evaluating personal aspects relating to him or her (...) which is based solely on automated processing, which produces legal effects concerning him or her or significantly affects him or her, like automatic refusal of an on-line credit application or e-recruiting practices without any human intervention. Such processing includes also 'profiling' consisting in any form of automated processing of personal data evaluating personal aspects relating to a natural person, in particular to analyse or predict aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements as long as it produces legal effects concerning him or her or significantly affects him or her<sup>41</sup>. However, decision making based on such processing, including profiling, should be allowed when authorised<sup>42</sup> by Union or Member State law to which the controller is subject, including for fraud and tax evasion monitoring and prevention purposes and to ensure the security and reliability of a service provided by the controller, or necessary for the entering or performance of a contract between the data subject and a controller, or when the data subject has given his or her explicit consent. In any case, such processing should be subject to suitable safeguards, including specific information of the data subject and the right to obtain human intervention, to express his or her point of view, to get an explanation of the decision reached after such assessment and the right to contest the decision. In order to ensure fair and transparent processing in respect of the data subject, having regard to the specific circumstances and context in which the personal data are processed, the controller should use adequate mathematical or statistical procedures for the profiling, implement technical and organisational measures appropriate to ensure **in particular**<sup>43</sup> that factors which result in data inaccuracies are corrected and the risk of errors is minimized, secure personal data in a way which takes account of the potential **risks threats** involved for the interests and rights of the data subject<sup>44</sup> and which prevents **inter alia** discriminatory effects against individuals on the basis of race or ethnic origin, political opinions, religion or beliefs, trade union membership, genetic or health status, sexual orientation or that result in measures having such effect<sup>45</sup>. Automated decision making and profiling based on special categories of personal data should only be allowed under specific conditions.

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<sup>41</sup> UK suggested to insert "in an adverse manner". In reaction, Cion indicated this would lower data protection standards.

AT reservation on "as long as it produces legal effects concerning him or her or significantly affects him or her".

<sup>42</sup> BE suggested adding ' or recommended', with regard to e.g. ECB recommendations.

<sup>43</sup> Suggestion Cion

<sup>44</sup> Further to DE proposal. IE expressed doubts about the before last sentence.

<sup>45</sup> UK considered Regulation not the appropriate place to refer to anti-discrimination measures.

58a) Profiling as such is subject to the (general) rules of this Regulation governing processing of personal data (legal grounds of processing, data protection principles etc.) with specific safeguards (for instance the obligation to conduct an impact assessment in some cases or provisions concerning specific information to be provided to the concerned individual). The European Data Protection Board should have the possibility to issue guidance in this context.<sup>46</sup>

#### *Article 4*

#### ***Definitions***

(12a) 'Profiling' means any form of automated processing of personal data consisting of using those data to evaluate personal aspects to a natural person, in particular to analyse and predict aspects concerning performance at work, economic situation, health, personal preferences, or interests, reliability or behaviour, location or movements;<sup>47</sup>

(12b) (...);

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<sup>46</sup> DE suggested in recital (59) to delete "public" in "...the keeping of public registers".  
<sup>47</sup> SI wanted the definition laid down in Article 15 of directive 95/46/EC.  
AT rejected the definition suggesting to use throughout the text the term "automated processing of personal data" in combination with "decision making" or taking of measures" based thereon. In reaction, Cion indicated this term was broader than profiling.

**CHAPTER III**  
**RIGHTS OF THE DATA SUBJECT<sup>48</sup>**

**SECTION 1**  
**TRANSPARENCY AND MODALITIES**

*Article 11*

*Transparent information and communication*

1. (...)
2. (...)

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<sup>48</sup> General scrutiny reservation by UK on the articles in this Chapter.

Article 12

**Transparent information, communication and modalities for exercising the rights of the data subject**

1. The controller shall take appropriate measures<sup>49</sup> to provide any information referred to in Articles 14 and 14a and any communication under Articles 15 to 19 and 32 relating to the processing of personal data to the data subject in an intelligible and easily accessible form, using clear and plain language<sup>50</sup>. The information shall be provided in writing, or by other<sup>51</sup> means, where appropriate electronically<sup>52</sup>. Where the data subject makes the request in electronic form, the information may as a rule be provided in electronic form, unless otherwise requested by the data subject. When requested by the data subject, the information may<sup>53</sup> be given orally provided that the identity of the data subject is proven.<sup>54 55 56 57</sup>

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<sup>49</sup> AT, supported by MT, PL, suggested to delete the text *take appropriate measures*, in contrast DE and NL wanted to keep this phrase.

<sup>50</sup> AT suggested adding: "and adapted to the data subject".

<sup>51</sup> SI suggested to insert "demonstrable".

<sup>52</sup> SE did not see any added value in *or where appropriate, electronically*, in contrast to CZ and PL, which wanted to keep this phrase.

AT meant that the information could be provided orally as long as the data subject agreed to that. COM found that idea sympathetic as long as the data subject was content and that it was not for the data subject to decide what form to use.

AT made a suggestion for the second sentence of paragraph 1 (7586/15 REV1)

IE was not convinced that data subjects under all circumstances could receive information in paper form.

<sup>53</sup> SK, suggested "must" instead of "may".

<sup>54</sup> UK suggested that the paragraph could also refer to machine readable information.

<sup>55</sup> IE opposed obliging the data controller to provide personal data in paper form in all cases as this could be burdensome and costly.

<sup>56</sup> DE suggested to add at the end "if this does not involve a disproportionate effort".

<sup>57</sup> DK, supported by FI, suggested to delete the last two sentences of the paragraph considering these too detailed and, because they do not take into account that electronic information sometimes cannot be provided for instance for security reasons or because the controller does not have that information in electronic form. In reaction, Cion, supported by DE and FI, suggested "may as a rule".

DE suggested to insert at the end "if this does not involve a disproportionate effort".

- 1a. <sup>58</sup>The controller shall facilitate<sup>59</sup> the exercise of data subject rights under Articles 15 to 19<sup>60</sup>. (...) In cases referred to in Article 10 (2) the controller shall not refuse to act on the request of the data subject for exercising his/her rights under Articles 15 to 19, unless the controller demonstrates that.<sup>61</sup> he is not in a position to identify the data subject.
2. The controller shall provide (...) information on action taken on a request under Articles 15 and 16 to 19 to the data subject without undue delay and at the latest within one month<sup>62</sup> of receipt of the request (...). This period may be extended for a further two months when necessary, taking into account the complexity of the request and the number of requests. Where the extended period applies, the data subject shall be informed within one month of receipt of the request of the reasons for the delay.

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<sup>58</sup> CZ, DK, EE, IE, FI, FR, SK, UK, MT: reservation.  
PL scrutiny reservation on relation between the last sentence of paragraph 1a and Article 10(2).  
AT scrutiny reservation. AT pointed to the relation with Article 12(4a).  
BE, supported by EE, FR, pointed to the importance of making the digital identification, for example through a log-in or an e-mail address, besides the identification of a physical person.

<sup>59</sup> CZ suggested instead: "The controller shall not make any obstacles to..."

<sup>60</sup> SI, CZ and UK thought this paragraph should be deleted because already covered by Article 10(2).

<sup>61</sup> UK suggested to delete "demonstrates that he" to align with Article 10(2).

<sup>62</sup> FR suggested a two months' period. UK said that the 1995 Directive uses '*without excessive delay*' and suggested to use it here too. NL supported FR and UK to extend the deadline. CZ, SI, UK pleaded in favour of deleting the one-month period. BG and PT thought it more simple to revert to the requirement of '*without excessive delay*' under the 1995 Data Protection Directive. SI suggested to say 'in accordance with law' because the MS have general rules on deadlines. BE was opposed to the one month deadline but thought it necessary to set out a fixed deadline. SK wanted a fixed deadline with flexibility of one month. ES and Cion said that a deadline was necessary, ES supporting a one month deadline.

3. If the controller does not take action on the request of the data subject, the controller shall inform the data subject without undue delay and at the latest within one month of receipt of the request of the reasons for not taking action and on the possibility of lodging a complaint to a supervisory authority (...).
4. Information provided under Articles 14 and 14a (...)<sup>63</sup> and any communication under Articles 16 to 19 and 32 shall be provided free of charge<sup>64</sup>. Where requests from a data subject are manifestly unfounded<sup>65</sup> or excessive<sup>66</sup>, in particular because of their repetitive character<sup>67</sup>, the controller (...) may refuse to act on<sup>68</sup> the request. In that case, the controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.
- 4a. <sup>69</sup>Without prejudice to Article 10, where the controller has reasonable doubts concerning the identity<sup>70</sup> of the individual making the request referred to in Articles 15 to 19, the controller may request the provision of additional information necessary to confirm the identity of the data subject.
5. (...)
6. (...)

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<sup>63</sup> UK wanted to see the reinsertion of a reference to Article 15.

<sup>64</sup> SE thought that since information in Article 14 was to be provided by the data subject it did not fit in the context to talk about free of charge.

<sup>65</sup> DE, supported by BE, ES and PL suggested to say *abusive* instead of manifestly unfounded. Also DE preferred "abusive". SI thought that *abusive* could be used in a recital. IE, AT, NL, DK, UK, PT, NO, RO, HR, EL, SI, CY, FI, CZ, LT, SE, SK, MT supported the term "manifestly unfounded".

<sup>66</sup> PL, supported by SE, thought that the criterion of 'manifestly excessive' required further clarification, *e.g.* through an additional recital.

CZ found the wording complex and suggested to grant the data subject the right to request information every 6 months.

<sup>67</sup> AT suggested to delete "in particular of their repetitive character".

<sup>68</sup> NL scrutiny reservation: avoid that this gives the impression that public authority cannot refuse to consider requests by citizens.

<sup>69</sup> AT suggested a recital on identification of the data subject (7586/15 REV1)

<sup>70</sup> BE, supported by SI, suggested to replace *identity* with *authentication*.



*Article 13*  
***Rights in relation to recipients***<sup>71</sup>

(...)

**SECTION 2**  
**INFORMATION AND ACCESS TO DATA**

*Article 14*  
***Information to be provided where the data are collected from the data subject***<sup>72</sup>

1. Where personal data relating to a data subject are collected from the data subject, the controller shall (...), at the time<sup>73</sup> when personal data are obtained, provide the data subject with the following information:

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<sup>71</sup> FR suggested a new Article 13a on standardised information policies, or, alternatively a recital, with the following wording: 'In order to ensure that the information to be provided to the data subjects according to this Regulation will be presented in an easily visible and clearly legible way and will appear in a language easily understood by the data subjects concerned, the European Data Protection Board shall issue guidelines to further specify the requirements for specific categories of processing or specific data processing sectors, including by issuing aligned tabular, using text and symbols or pictographs.' that is inspired by a suggestion by the EP.

<sup>72</sup> DE, ES, NL, SE, FI, PT and UK scrutiny reservation.  
DE, supported by ES and NL, has asked the Commission to provide an assessment of the extra costs for the industry under this provision. DE found the EP idea of providing information in the form of symbols was an interesting idea which facilitates the provision of information. SE found it peculiar that for example a court would be obliged to provide separate information to the data subject about a case that the data subject had initiated; such obligations are set out in the code on procedure.

<sup>73</sup> UK, supported by CZ, suggested to have instead: "as soon as / where practicable,". In reaction, Cion indicated that this would lower the level of data protection compared to the Directive 95/46/EC.

DE suggested to insert "where appropriate". In response, Cion indicated that "where appropriate" is not possible because the moment that the controller would ask data from the data subject it must inform the data subject.

- (a) the identity and the contact details of the controller and, if any, of the controller's representative; the controller shall<sup>74</sup> also include the contact details of the data protection officer, if any;
- (b) the purposes of the processing for which the personal data are intended (...) as well as the legal basis of the processing<sup>75</sup>.
- 1a. In addition to the information referred to in paragraph 1, the controller shall<sup>76</sup> at the time when personal data are obtained<sup>77</sup> provide the data subject with such further information<sup>78</sup> that is necessary to ensure fair and transparent processing (...) <sup>79</sup>, having regard to the specific circumstances and context in which the personal data are processed<sup>80,81</sup>.

<sup>74</sup> NL, supported by IE, proposed "may" instead of "shall" arguing that the data protection officer is part of the data controller and, therefore, should not be referred to separately. In reaction, Cion pointed to the partial general approach on Article 35 which does not provide for an obligation to appoint a data protection officer. For that reason having "shall in point (1)(a) does not add to administrative burden. Moreover, it is important that the data protection officer is known because he acts as contact point for the data subject. Related provision in Article 14 a(1)(a).

<sup>75</sup> Suggestion of AT, HU, PL, SK. Opposed by DK, SE.

<sup>76</sup> DE, EE, and PL asked to insert "on request". BE suggested to replace *shall* with *may*. DE, DK, NL and UK doubted whether the redraft would allow for a sufficient risk-based approach and warned against excessive administrative burdens/compliance costs. NL, supported by CY, EE and CZ, suggested therefore to add 'where appropriate' after *shall*. DK and UK in particular referred to the difficulty for controllers in assessing what is required under para. 1a in order to ensure fair and transparent processing. DE, EE and PL pleaded for making the obligation to provide this information contingent upon a request thereto as the controller might otherwise take a risk-averse approach and provide all the information under Article 14(1a), also in cases where not required. UK thought that many of the aspects set out in paragraph 1a of Article 14 (and paragraph 2 of Article 14a) could be left to guidance under Article 39. DE, supported by IT, suggested to insert 'at the time when the personal data was obtained'. In contrast, IT thought that it was not necessary to provide the information at the same time.

<sup>77</sup> DE suggestion supported by Cion and PL.

<sup>78</sup> CZ suggested adding the word 'obviously'.

<sup>79</sup> Deleted at the suggestion of FR. AT, BE, opposed by Cion, wanted to delete the end of the sentence from 'having regard ...'

<sup>80</sup> COM reservation, supported by ES, on deletion of the words 'such as'. AT preferred the COM proposal because in particular the new paragraph 1a was drafted in a too open and vague manner, therefore the NL suggestion to add *where appropriate* went in the wrong direction. IT was against reducing the safeguards and considered the text as the bare minimum.

<sup>81</sup> CZ, supported by Cion, suggested to insert again the reference to the data subject.

- (a) (...),<sup>82</sup>
- (b) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;
- (c) the recipients or categories of recipients of the personal data<sup>83</sup>;
- (d) where applicable, that the controller intends to transfer personal data to a recipient in a third country or international organisation;
- (e) the existence of the right to request from the controller access to and rectification or erasure of the personal data or restriction of processing of personal data concerning the data subject and to object to the processing of such personal data (...) as well as the right to data portability<sup>84</sup>;
- (ea) where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2)<sup>85</sup>, the existence of the right to withdraw consent<sup>86</sup> at any time<sup>87</sup>, without affecting the lawfulness of processing based on consent before its withdrawal;
- (f) the right to lodge a complaint to a supervisory authority (...)<sup>88</sup>;

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<sup>82</sup> BE, supported by FR, HU, IT, MT, SK, PL, wanted either to reintroduce the text of Article 14(1)(c) on storage period or add as the EP has done *the criteria used to determine the period*. Cion also supported the reinsertion on text on a storage period.

<sup>83</sup> AT and DE thought that this concept was too vague (does it e.g. encompass employees of the data controller?).

<sup>84</sup> BE suggestion, supported by COM. The reference to direct marketing was deleted in view of comments by DK, FR, IT and SE. IT said that the information in paragraphs (e) and (f) were set out in Article 8 of the Charter and always had to be provided and therefore needed to be included in paragraph 1.

<sup>85</sup> DE suggested to delete "or point (a) of Article 9(2)".

<sup>86</sup> DE suggested to insert "pursuant to Article 7(4).

<sup>87</sup> DE suggested to insert a reference to Article 7(3).

<sup>88</sup> IT said that the information in paragraphs (e) and (f) were set out in Article 8 of the Charter and always had to be provided and therefore needed to be included in paragraph 1.

- (g) whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the data and of the possible consequences of failure to provide such data<sup>89</sup>;
- (h) <sup>90</sup>*the existence of automated decision making including profiling referred to in Article 20(1) and (3) and<sup>91</sup> information concerning (...) the logic involved<sup>92</sup>, as well as the significance and the envisaged consequences of such processing for the data subject.*<sup>93</sup>

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<sup>89</sup> CZ, DE, ES and NL reservation. NL asked if it was mandatory to provide the information if the processing was based on a legal obligation.

<sup>90</sup> PL suggested: "where applicable, information about the existence of profiling referred to in Article 4(12a) and/or about automated decision making referred to in Article 20(1) and (3) and information concerning....".

<sup>91</sup> PL suggested instead "and/or".

<sup>92</sup> IE suggested to delete the phrase "the logic involved" considering it unnecessary because already covered by Article 15(1)(h). SE preferred to delete this phrase. AT pointed out need to make terms consistent in this paragraph and Articles 14a(2) and Article 15(1)(h).

<sup>93</sup> SE and IE scrutiny reservation. IT meant that there were problems with this paragraph if the current text of Article 20 was maintained. DK suggested to delete this point considering it too burdensome.

- 1b. Where the controller intends to further<sup>94</sup> process the data (...) for a purpose other than the one for which the data were collected the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 1a.<sup>95 96</sup>
2. (...)<sup>97</sup>
3. (...)
4. (...)

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<sup>94</sup> DK, IE, FR reservation.

DE: scrutiny reservation.

<sup>95</sup> UK suggested to delete this paragraph.

NL said that business was worried how this provision would be interpreted if it becomes an obligation. AT meant that the paragraph was relevant and important. FR, IT, PL, RO, NO and COM supported paragraph (1b).

<sup>96</sup> BE, PL pointed out that Article 14(1b) and Article 14a(3a) should use consistent wording. DE made a suggestion (8089/15/).

Cion opposed the DE suggestion under reference to Article 21 which allows Member States to restrict of the obligations and rights in inter alia Article 14 and 14a. Moreover, Directive 95/46/EC does not provide for such restrictions and therefore the DE suggestions would lower the level of data protection.

DK considered the wording of the paragraph less clear now that the reference to Article 6(4) has been deleted and wanted to await the outcome of the horizontal discussion on further processing. DE, supported by FR, pointed out that it understood the paragraph to concern both compatible and incompatible purposes given that that the reference to Article 6(4) which refers to incompatible purposes only was deleted.

<sup>97</sup> HU and AT reservation on the deletion of this paragraph.  
DE made a suggestion (8089/15)

5. Paragraphs 1, 1a and 1b<sup>98</sup> shall not apply where and insofar as the data subject already has the information<sup>99</sup>,

100

6. (...)  
7. (...)  
8. (...)

*Article 14 a*

**Information to be provided where the data have not been obtained from the data subject**<sup>101</sup>

1. Where personal data have not been obtained from the data subject, the controller shall provide the data subject with the following information<sup>102 103</sup>:
- (a) the identity and the contact details of the controller and, if any, of the controller's representative; the controller shall<sup>104</sup> also include the contact details of the data protection officer, if any;

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<sup>98</sup> Suggestion by CZ, DK, NL, SE and NO.

ES considered that the reference to paragraph 1b could be deleted.

<sup>99</sup> SE, supported by CZ, thought that it was necessary to insert more exceptions to the obligation to provide information SE mentioned such as illness or a fire. COM cautioned against limiting Article 14 too much. SE further considered that a similar provision to the one in Article 14a(4)(c) should be added. SE noted that recital 50 did not make a difference between the situations in Article 14 and 14a. Article 21 on restrictions would be difficult to use to create exceptions considered SE.

PL made a suggestion (8295/15).

<sup>100</sup> DE, on the substance supported by IE, MT, suggested to add a new point (f): "where the data are processed by a micro enterprise which processes data only as an ancillary activity.

<sup>101</sup> DE, ES, AT, PT scrutiny reservation.

<sup>102</sup> DE suggested to add: "where appropriate".

<sup>103</sup> RO wanted to add that this information should be provided once per year.

<sup>104</sup> NL, supported by IE, proposed "may" instead of "shall" arguing that the data protection officer is part of the data controller and, therefore, should not be referred to separately.

(b) the purposes of the processing for which the personal data are intended as well as the legal basis of the processing<sup>105</sup>.

2. In addition to the information referred to in paragraph 1, the controller shall provide the data subject with such further information **that is** necessary to ensure fair and transparent processing in respect of the data subject,<sup>106</sup> having regard to the specific circumstances and context<sup>107</sup> in which the personal data are processed (...)<sup>108</sup>:

(a) the categories of personal data concerned;

(b) (...)<sup>109</sup>

(c) where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;

(d) the recipients or categories of recipients of the personal data;

(da) where applicable, that the controller intends to transfer personal data to a recipient in a third country or international organisation;

(e) the existence of the right to request from the controller access to and rectification or erasure of the personal data or restriction of processing of personal data<sup>110</sup> concerning the data subject and to object to the processing of such personal data as well as the right to data portability (...);

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<sup>105</sup> Suggestion of HU, AT, PL and SK. Opposed by DK, SE.

PL also suggested a new point: "the origin of the personal data, unless the data originate from publicly accessible sources".

<sup>106</sup> BE suggested to delete the end of the sentence from '*having regard to ...*'

<sup>107</sup> IT and FR doubts on the addition of the words 'and context'.

<sup>108</sup> DE suggested to add: "at the time when personal data are processed for the first time".

<sup>109</sup> BE, IT, FR, HU, MT, SK, PL, supported by Cion, wanted, as in Article 14(1a), a text on storage period or add as the EP has done *the criteria used to determine the period*.

<sup>110</sup> Suggestion of SE.

- (ea) where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;
- (f) the right to lodge a complaint to a supervisory authority (...);
- (g) <sup>111</sup>from which source the personal data originate, unless the data originate from publicly accessible sources<sup>112; 113</sup>
- (h) <sup>114</sup>*the existence of automated decision making including profiling referred to in Article 20(1) and (3) and*<sup>115</sup> information concerning the logic involved<sup>116</sup>, *as well as the significance and the envisaged consequences of such processing for the data subject.*<sup>117</sup>

3. The controller shall provide the information referred to in paragraphs 1 and 2:

- (a) within a reasonable period after obtaining the data, but at the latest within one month<sup>118</sup>, having regard to the specific circumstances in which the data are processed, or
- (b) if a disclosure to another recipient is envisaged, at the latest when the data are first disclosed.

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<sup>111</sup> Suggestion of DE. PL suggested to move this point to paragraph 1.

<sup>112</sup> Cion and AT scrutiny reservation. BE, supported by AT, ES and SE, suggested to delete paragraph (g). IT suggested to delete the phrase: "unless.... sources".

<sup>113</sup> Cion reservation (in line with position on the deletion of paragraph 4(d). PL suggested to move point (g) to paragraph 1.

<sup>114</sup> PL suggested to insert the same text as suggested in Article 14(1a).

<sup>115</sup> PL suggested instead "and/or".

<sup>116</sup> IE, SE considered the phrase "the logic ...processing" unnecessary because already covered by Article 15(1)(h).

AT pointed out the need to make terms consistent between this paragraph and Articles 14a(2) and Article 15(1)(h).

<sup>117</sup> DK suggested to delete this point considering it too burdensome.

<sup>118</sup> CZ reservation on one month fixed period.



3a Where the controller intends to further <sup>119</sup>process the data (...) for a purpose other than the one for which the data were obtained<sup>120</sup>, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2.<sup>121122</sup>

4. Paragraphs 1 to 3a shall not apply where and insofar as:

- (a) the data subject already has the information; or
- (b) the provision of such information (...) proves impossible or would involve a disproportionate effort <sup>123</sup> 124; in such cases the controller shall take appropriate measures to protect the *data subject's* rights and freedoms and legitimate interests<sup>125</sup>; or

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<sup>119</sup> DK, FR, IE: reservation

**DE: scrutiny reservation.**

DE, FI, PL queried what "purpose other than the one for which the data were obtained" meant.

<sup>120</sup> CZ scrutiny reservation on concept of obtaining data.

<sup>121</sup> IT meant that paragraph 3a represented the bare minimum of protection. AT support of the paragraph. UK meant that it should be used taking into account proportionality and practicability.

DK, FI considered the wording of the paragraph less clear now that the reference to Article 6(4) has been deleted. DK would await the outcome of the horizontal discussion on further processing.

<sup>122</sup> DE made a text suggestion (8089/15).

<sup>123</sup> FR and AT asked what the words *or is likely ... purposes of the processing* were supposed to mean. COM wanted to delete that part of the paragraph. CZ wanted to keep the text in order to avoid fraud. COM noted that it was important to avoid fraud but considered that Article 21 gave the necessary flexibility for that.

<sup>124</sup> Suggestion of ES, FR, supported by Cion, to delete the phrase " or is likely to render impossible or to seriously impair the achievement of the purposes of the processing". CZ, DE, EE, opposed deletion of this phrase. Scrutiny reservation: IE. COM scrutiny reservation.

<sup>125</sup> Several delegations (FI, PL, SI, SK, and LT) thought that in this Regulation (contrary to the 1995 Directive) the text should be specified so as to clarify both the concepts of 'appropriate measures' and of 'legitimate interests'. According to the Commission, this should be done through delegated acts under Article 15(7). DE warned that a dangerous situation might ensue if these delegated acts were not enacted in due time.

- (c) obtaining or disclosure is expressly laid down by Union or Member State law to which the controller is subject, which provides appropriate measures to protect the data subject's legitimate interests<sup>126</sup>; or
- (d) (...)<sup>127</sup>;
- (e) where the data must remain confidential in accordance with a legal provision in Union or Member State law (...)<sup>128, 129, 130</sup>.

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5. (...)

6. (...)

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<sup>126</sup> UK thought the requirement of a legal obligation was enough and no further appropriate measures should be required.

<sup>127</sup> The phrase "where the data originate from publicly accessible resources, or" was deleted at the request of a large number of delegations. CZ, DE, EE, SE and UK emphasised the importance of this exception given the quantity of data published on the internet. In reaction Cion indicated that re-instating this phrase would bring the risk of profiling without the subject knowing.

<sup>128</sup> COM and AT reservation on (d) and (e). UK referred to the existence of case law regarding privilege (confidentiality). BE, supported by PL, thought the reference to the overriding interests of another person was too broad.

<sup>129</sup> IT said that the information in paragraphs (e) and (f) were set out in Article 8 of the Charter and always had to be provided and therefore needed to be included in paragraph 1.

<sup>130</sup> CZ proposed to re-insert the text "or because of the overriding legitimate interests of another person".

<sup>131</sup> DE, on the substance supported by IE, MT, suggested to add a new point (f): "where the data are processed by a micro enterprise which processes data only as an ancillary activity."

Article 15

***Right of access for the data subject***<sup>132</sup>

1. The data subject shall have the right to obtain from the controller<sup>133 134</sup> at reasonable intervals and free of charge<sup>135</sup> (...) confirmation as to whether or not personal data concerning<sup>136</sup> him or her are being processed <sup>137</sup> and where such personal data are being processed access to the data and the following information:
- (a) the purposes of the processing<sup>138</sup>;
  - (b) (...)
  - (c) the recipients or categories of recipients to whom the personal data have been or will be disclosed, in particular ~~to~~ recipients in third countries<sup>139</sup> **or international organisations**<sup>140</sup>;
  - (d) where possible, the envisaged<sup>141</sup> period for which the personal data will be stored;

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<sup>132</sup> DE and SE scrutiny reservation. DE, LU and UK expressed concerns on overlaps between Articles 14 and 15.

<sup>133</sup> FR suggested to add a right of access to processors.

<sup>134</sup> DE suggested to insert "on request".

<sup>135</sup> DE, ES, HU, IT and PL reservation on the possibility to charge a fee. DE and SE thought that free access once a year should be guaranteed.

<sup>136</sup> FR suggested to change *concerning* to *belonging* so that different forms of telecommunication would be covered. COM said that *concerning* was used in Article 8 in the Charter.

<sup>137</sup> DE made a text suggestion (8089/15).

<sup>138</sup> HU thought the legal basis of the processing should be added.

<sup>139</sup> UK reservation on the reference to recipients in third countries. IT thought the concept of recipient should be clarified, inter alia by clearly excluding employees of the controller.

<sup>140</sup> Presidency suggestion to be consistent with paragraph (1a), Article 14a(d) and 14a(2)(da).

<sup>141</sup> ES and UK proposed adding 'where possible'; FR reservation on 'where possible' and 'envisaged'; FR emphasised the need of providing an exception to archives.

- (e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of the processing of personal data concerning the data subject or to object to the processing of such personal data;
- (f) the right to lodge a complaint to a supervisory authority (...) <sup>142 143</sup>;
- (g) where the personal data are not collected from the data subject, any available information as to their source <sup>144</sup>;
- (h) <sup>145</sup>in the case of decisions based on automated processing including profiling referred to in Article 20(1) and (3), information concerning the logic involved <sup>146</sup> as well as the significance and envisaged consequences of such processing <sup>147</sup>.

- 1a. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 42 relating to the transfer <sup>148</sup>.

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<sup>142</sup> DE thought it was too onerous to repeat this for every data subject and pointed to difficulties in ascertaining the competent DPA in its federal structure.

<sup>143</sup> IT and SK suggestion to delete subparagraphs (e) and (f) as under Article 14 this information should already be communicated to the data subject at the moment of the collection of the data.

<sup>144</sup> SK scrutiny reservation: subparagraph (g) should be clarified.

<sup>145</sup> PL made a suggestion (8295/15).

<sup>146</sup> PL reservation on the reference to 'logic': the underlying algorithm should not be disclosed. SE wanted to delete it. BE and IT opposed the deletion of the words *logic* because it would go below the level of the 1995 Directive (Article 12(a)). DE reservation on reference to decisions.

<sup>147</sup> FR harboured doubts on its exact scope.

DE suggested to redraft point (h): " Redraft point (h) as follows: "in case of decisions based on automated processing including profiling referred to in Article 20(1) and (3), ~~knowledge of and~~ information concerning the logic involved ~~in any automated data processing~~ as well as the significance and envisaged consequences of such processing; the right to obtain this information shall not apply in particular where trade secrets of the controller would be disclosed." NL supported DE suggestion as regards trade secrets.

<sup>148</sup> FR and UK scrutiny reservation on links with Chapter V.

1b. On request <sup>149</sup> and without an excessive charge <sup>150</sup>, the controller shall provide a copy of the personal data undergoing processing to the data subject.

2. (...)

2a. <sup>151</sup>The right to obtain a copy referred to in paragraph 1b (...) shall not apply where such copy cannot be provided without disclosing personal data of other data subjects or confidential data of the controller. Furthermore, this right shall **not apply if disclosing personal data would infringe intellectual property rights in relation to the processing of those personal data. be without prejudice to** intellectual property rights in relation to processing of those personal data. <sup>152 153154155 156</sup>

3. (...)

4. (...)

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<sup>149</sup> FR made a suggestion for paragraph (1b) in 7464/15.

<sup>150</sup> ES wanted no charge except in case that the costs are very high or that the data subject requests a special format.

<sup>151</sup> AT, EE, ES: scrutiny reservation.

EE suggested to delete "or confidential data of the controller".

PT suggested to clarify in a recital that access to intellectual property rights can be obtained in return for a payment.

DE made a text suggestion (8089/15).

<sup>152</sup> UK suggestion

<sup>153</sup> Cion reservation considering that the paragraph restricts too much the right to obtain a copy of the personal data and referred to the possibility to restrict this right if the requirements of Article 21(1)(f) are met..

DE, supported by UK, referred to the danger that data pertaining to a third party might be contained in such electronic copy.

<sup>154</sup> FR suggested to add "which were not supplied by the data subject to the controller".

<sup>155</sup> DE suggested to add a new paragraph (2a): "There shall be no right of access in accordance with paragraphs 1 and 1b when data are processed by, or are entrusted to become known to, a person who is subject to an obligation of professional secrecy regulated by Union or Member State law or to a statutory obligation of secrecy, except if the data subject is empowered to lift the secrecy in question and acts accordingly."

<sup>156</sup> DE suggested a new provision: "There shall be no right of access in accordance with paragraphs 1 and 1b when data are processed by, or are entrusted to become known to, a person who is subject to an obligation of professional secrecy regulated by Union or Member State law or to a statutory obligation, except where the subject is empowered to lift the secrecy in question and acts accordingly."

## SECTION 3

### RECTIFICATION AND ERASURE

#### *Article 16*

#### ***Right to rectification***<sup>157</sup>

1. (...) The data subject shall have the right<sup>158</sup> to obtain from the controller without undue delay<sup>159</sup> the rectification of personal data concerning him or her which are inaccurate. Having regard to the purposes<sup>160</sup> for which data were processed, the data subject shall have the right to obtain completion of incomplete personal data, including by means of providing a supplementary (...) statement.
2. (...)

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<sup>157</sup> DE and UK scrutiny reservation.

<sup>158</sup> UK, supported by CZ, suggested to insert the qualification 'where reasonably practicable'

UK, supported by CZ, also suggested inserting the qualification 'where necessary'.

<sup>159</sup> Suggestion from the SE.

<sup>160</sup> BE asked why the reference to the *purposes* had been inserted.

Article 17

***Right to erasure and “to be forgotten”<sup>161</sup>***

1. <sup>162</sup>The (...) controller shall have the obligation to erase personal data without undue delay.

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<sup>161</sup> SI reservation on "right to be forgotten".

FR, NL, RO, SE and SK: reservation on the applicability to the public sector.

Whereas some Member States have welcomed the proposal to introduce a right to be forgotten (AT, FR, IE); other delegations were more sceptical as to the feasibility of introducing a right which would go beyond the right to obtain from the controller the erasure of one's own personal data (DE, DK, ES). The difficulties flowing from the household exception (UK), to apply such right to personal data posted on social media were highlighted (BE, DE, FR), but also the impossibility to apply such right to 'paper/offline' data was stressed (LU, SI). Some delegations (DE, ES) also pointed to the possible externalities of such right when applied with fraudulent intent (e.g. when applying it to the financial sector). Several delegations referred to the challenge to make data subjects active in an online environment behave responsibly (DE, LU and UK) and queried whether the creation of such a right would not be counterproductive to the realisation of this challenge, by creating unreasonable expectations as to the possibilities of erasing data (DK, LU and UK). Some delegations thought that the right to be forgotten was rather an element of the right to privacy than part of data protection and should be balanced against the right to remember and access to information sources as part of the freedom of expression (DE, ES, LU, NL, SI and UK).

It was pointed out that the possibility for Member States to restrict the right to be forgotten under Article 21 where it interferes with the freedom of expression is not sufficient to allay all concerns in that regard as it would be difficult for controllers to make complex determinations about the balance with the freedom of expression, especially in view of the stiff sanctions provided in Article 79 (UK). In general several delegations (CZ, DE, FR) stressed the need for further examining the relationship between the right to be forgotten and other data protection rights. The Commission emphasised that its proposal was in no way meant to be a limitation of the freedom of expression. The inherent problems in enforcing such right in a globalised world outside the EU were cited as well as the possible consequences for the competitive position of EU companies linked thereto (BE, AT, LU, NL, SE and SI).

AT made a suggestion to distinguish the right to erasure and the right to be forgotten (7586/15 REV1).

<sup>162</sup> SE suggested to insert in the beginning of the sentence *At the request of the data subject, the controller ...* to indicate that the controller was not supposed to act at its own initiative.

especially in relation to personal data which are collected when the data subject was a child, and the data subject<sup>163</sup> shall have the right to obtain from the controller<sup>164</sup> the erasure of personal data concerning him or her without undue delay where one of the following grounds applies:

- (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1) or point (a) of Article 9(2) and (...) there is no other legal ground for the processing of the data;<sup>165</sup>
- (c) the data subject objects to the processing of personal data<sup>166</sup> pursuant to Article 19(1) and there are no overriding legitimate grounds for the processing or the data subject objects to the processing of personal data pursuant to Article 19(2);

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<sup>163</sup> SE wanted to delete the part of the text from *without* until *and the data subject*.

<sup>164</sup> Suggestion of DE, supported by Cion.

<sup>165</sup> AT asked if this referred to further processing and wanted that to be clarified in a recital.

<sup>166</sup> NL suggested to refer to a specific request for erasure pursuant to Article 19(1).



- (d) the data have been unlawfully processed<sup>167</sup>;
- (e) the data have to be erased for compliance with a legal obligation to which the controller is subject<sup>168</sup>;
- (f) ~~the data have been collected when the data subject was a child, in relation to the offering of information society services referred to in Article 8 (1).~~<sup>169</sup>

**1a . The data subject shall have also the right to obtain from the controller the erasure of personal data concerning him or her, without undue delay, if the data have been collected in relation to the offering of information society services referred to in Article 8(1).**

(...).

2. (...).

<sup>167</sup>

UK and CZ scrutiny reservation: this was overly broad.

<sup>168</sup>

DE pointed to the difficulties in determining who is the controller in respect of data who are copied/made available by other controllers (e.g. a search engine) than the initial controller (e.g. a newspaper). AT opined that the exercise of the right to be forgotten would have take place in a gradual approach, first against the initial controller and subsequently against the 'secondary' controllers. ES referred to the problem of initial controllers that have disappeared and thought that in such cases the right to be forgotten could immediately be exercised against the 'secondary controllers' ES suggested adding in paragraph 2: 'Where the controller who permitted access to the personal data has disappeared, ceased to exist or cannot be contacted by the data subject for other reasons, the data subject shall have the right to have other data controllers delete any link to copies or replications thereof'. The Commission, however, replied that the right to be forgotten could not be exercised against journals exercising freedom of expression. According to the Commission, the indexation of personal data by search engines is a processing activity not protected by the freedom of expression.

<sup>169</sup>

New point (f) supported by EE, FI (preliminary), AT, FR, HU, IT, MT  
CY (could accept point (f)), DE, DK, ES, IE, PT, SE requested to clarify point (f).  
SE suggested to add at the end: "when this is requested by the data subject"..  
NL pointed at link between paragraph (f) and the introduction of the paragraph which both refer to children.  
DK, PL, UK considered the reference to children in the introduction enough and suggested to delete point (f). SI suggested a recital instead.

2a. <sup>170</sup>Where the controller<sup>171</sup> (...) has made the personal data public<sup>172</sup> and is obliged pursuant to paragraph 1 to erase the data, the controller, taking account of available technology and the cost of implementation<sup>173</sup>, shall<sup>174</sup> take (...) reasonable steps<sup>175</sup>, including technical measures, (...) to inform controllers<sup>176</sup> which are processing the data, that the data subject has requested the erasure by such controllers of any links to, or copy or replication of that personal data<sup>177</sup>.

- <sup>170</sup> Cion, supported by BE, ES, LT: reservation considering that the paragraph lowers data protection standards compared to the directive currently in force.
- <sup>171</sup> BE, DE and SI queried whether this also covered controllers (e.g. a search engine) other than the initial controller (e.g. a newspaper).
- <sup>172</sup> DE suggested to add "or has transmitted them to a recipient".  
ES preferred referring to 'expressly or tacitly allowing third parties access to'. IE thought it would be more realistic to oblige controllers to erase personal data which are under their control, or reasonably accessible to them in the ordinary course of business, i.e. within the control of those with whom they have contractual and business relations. BE, supported by IE and LU, also remarked that the E-Commerce Directive should be taken into account (e.g. through a reference in a recital) and asked whether this proposed liability did not violate the exemption for information society services provided in that Directive (Article 12 of Directive 2000/31/EC of 8 June 2000), but COM replied there was no contradiction. LU pointed to a risk of obliging controllers in an online context to monitor all data traffic, which would be contrary to the principle of data minimization and in breach with the prohibition in Article 15 of the E-Commerce Directive to monitor transmitted information.
- <sup>173</sup> Further to NL suggestion. This may hopefully also accommodate the DE concern that the reference to available technology could be read as implying an obligation to always use the latest technology. FR raised doubts about the fact that the provision was only applicable when the data had been made public.
- <sup>174</sup> CZ, FI, IE, NL, PL, UK, wanted to reinsert "at the request of the data subject" arguing that the data subject would not know that there is data concerning him. NL wondered how the controller could know without a request of the data subject that certain information would need to be erased. AT, CY, EE, HU, FR, MT, supported by Cion, could accept not having this phrase.
- <sup>175</sup> LU queried why the reference to all reasonable steps had not been inserted in paragraph 1 as well and SE, supported by DK, suggested clarifying it in a recital. COM replied that paragraph 1 expressed a results obligation whereas paragraph 2 was only an obligation to use one's best efforts. ES thought the term should rather be 'proportionate steps'. DE, ES and BG questioned the scope of this term. ES queried whether there was a duty on controllers to act proactively with a view to possible exercise of the right to be forgotten. DE warned against the 'chilling effect' such obligation might have on the exercise of the freedom of expression.
- <sup>176</sup> PL, UK wanted to keep "known" controller. UK argued that in order to compare the standards of Directive 95/46/EC with those of the new regulation need to be considered in light of the explosive growth of Internet. Moreover, UK pointed out that the directive refers to disproportionate efforts whereas paragraph 2a of the regulation does not have such a reference; against that background, UK would consider the limitation to "known" controllers justified.  
PL made two alternative suggestions (8295/15).  
SK suggested to refer instead to controllers with whom the controller has contractual relations.
- <sup>177</sup> FR suggested to add "and on which grounds that request was accepted". BE and ES queried whether this was also possible for the offline world and BE suggested to clearly distinguish the obligations of controllers between the online and offline world. Several Member States (CZ, DE, LU, NL, PL, PT, SE and SI) had doubts on the enforceability of this rule. ES and PL suggested to delete paragraph 2a. HU found the content of paragraph (2a) not clear as it refers at the same time to an obligation to erase data and to cases where the data subject requested erasure. As a result, it is unclear whether the paragraph applies or not in cases of erasure not on request of the data subject but on other grounds.

3. Paragraphs 1 and 2a shall not apply<sup>178</sup> to the extent that (...) processing of the personal data is necessary:
- a. for exercising the right of freedom of expression and information<sup>179</sup> **referred to in Article 80**<sup>180</sup>;
  - b. *for compliance with a legal obligation which requires processing of*<sup>181</sup> *personal data by Union or Member State law to which the controller is subject*<sup>182</sup> or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller<sup>183</sup>;

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<sup>178</sup> DE queried whether these exceptions also applied to the abstention from further dissemination of personal data. AT and DE pointed out that Article 6 contained an absolute obligation to erase data in the cases listed in that article and considered that it was therefore illogical to provide for exception in this paragraph.

<sup>179</sup> FR queried whether the right to information should be included in the Article considering that this right is linked to Article 80 which does not include search engines. In reaction, Pres argued that the provisions on data controllers apply to search engines. Furthermore, Cion indicated that the freedom of expression and information is in the Charter and therefore the reference in Article 17(3)(a) will not change the interpretation of Article 80.

<sup>180</sup> FR suggested to delete "referred to in Article 80". This would then cover the other FR suggestion, which was supported by CY, IE, IT, to insert a new point (aa): "for the interest of the general public to have access to that information". Cion considered that the phrase "referred to in Article 80" has added value as it indicates that it is up for the Member States to reconcile in their national law the right to the protection of personal data with freedom of expression and information.

DE and EE asked why this exception had not been extended to individuals using their own freedom of expression (e.g. an individual blogger).

<sup>181</sup> FI suggestion, supported by DE and COM, to narrow down the scope.

<sup>182</sup> In general DE thought it was a strange legal construct to lay down exceptions to EU obligations by reference to national law. DK and SI were also critical in this regard. UK, supported by IE, thought there should be an exception for creditworthiness and credit scoring, which is needed to facilitate responsible lending, as well as for judicial proceedings. IT suggested inserting a reference to Article 21(1).

<sup>183</sup> AT, PL scrutiny reservation. PL suggested: to add "when expressly laid down by Union or Member States law".

- c. for reasons of public interest in the area of public health in accordance with Article 9(2) (h)<sup>184</sup> and (hb) as well as Article 9(4)<sup>185</sup>;
  - d. <sup>186</sup>for archiving purposes in the public interest or for scientific, statistical and historical (...) purposes in accordance with Article 83<sup>187</sup>;
  - e. (...)
  - f. (...)
  - g. for the establishment, exercise or defence of legal claims.<sup>188</sup>
4. (...)
5. (...)

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<sup>184</sup> COM thought that (h) should be deleted.

<sup>185</sup> ES and DE indicated that this related to the more general question of how to resolve differences of view between the data subject and the data controller, especially in cases where the interests of third parties were at stake. PL asked what was the relation to Article 21.

<sup>186</sup> FR considered point (d) not needed because of Article 83. Previously, FR has suggested to move "in the public interests" after "purposes" in order to extend the limitation provided for archiving purposes to the other purposes.

AT considered a global provision inadequate for applying data protection rules in specific cases.

<sup>187</sup> DE suggested: "... and historical purposes where the erasure would involve disproportionate effort or processing is essential for those purposes ~~in accordance with Article 83~~". Cion opposed this suggestion considering that it would do away with the obligation in Article 83 to provide safeguards.

<sup>188</sup> DE suggested a new paragraph 3a "Where the erasure is carried out, the controller shall not otherwise process such data".

Article 17a

**Right to restriction of processing**

1. The data subject shall have the right to obtain from the controller the restriction of the processing of personal data where:
  - (a)<sup>189</sup> the accuracy of the data is contested by the data subject, for a period enabling the controller to verify the accuracy of the data<sup>190</sup>;
  - (b) the controller no longer needs the personal data for the purposes of the processing, but they are required by the data subject for the establishment, exercise or defence of legal claims; or
  - (c) he or she has objected to processing pursuant to Article 19(1) pending the verification whether the legitimate grounds of the controller override those of the data subject.
2. (...)
3. Where processing of personal data has been restricted under paragraph 1, such data may, with the exception of storage, only be processed with the data subject's consent or for the establishment, exercise or defence of legal claims or for the protection of the rights of another natural or legal person or for reasons of important public interest<sup>191</sup>.

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<sup>189</sup> FR considered the wording of point (a) ambiguous.

<sup>190</sup> FR scrutiny reservation: FR thought the cases in which this could apply, should be specified.

<sup>191</sup> DE and SI asked who was to define the concept of public interest. DE reservation.

4. A data subject who obtained the restriction of processing pursuant to paragraph 1 (...) shall be informed by the controller before the restriction of processing is lifted<sup>192</sup>.
5. (...)
- 5a. (...)<sup>193</sup>

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<sup>192</sup> DE, PT, SI and IT thought that this paragraph should be a general obligation regarding processing, not limited to the exercise of the right to be forgotten. DK likewise thought the first sentence should be moved to Article 22. FR preferred the previous version of the text.

<sup>193</sup> Deleted in view of the new article 83.

Article 17b

**Notification obligation regarding rectification, erasure or restriction**<sup>194 195</sup>

The controller shall communicate any rectification, erasure or restriction of processing carried out in accordance with Articles 16, 17(1) and 17a to each<sup>196</sup> recipient to whom the data have been disclosed (...), unless this proves impossible or involves disproportionate effort.

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<sup>194</sup> Whilst several delegations agreed with this proposed draft and were of the opinion that it added nothing new to the existing obligations under the 1995 Directive, some delegations (DE, PL, SK and NL) pointed to the possibly far-reaching impact in view of the data multiplication since 1995, which made it necessary to clearly specify the exact obligations flowing from this proposed article. Thus, DE, supported by PL, was opposed to a general obligation to log all the disclosures to recipients. DE, supported by PL, also pointed out that the obligation should exclude cases where legitimate interests of the data subject would be harmed by a further communication to the recipients, that is not the case if the recipient would for the first time learn negative information about the data subject in which he has no justified interest. BE and ES asked that the concept of a 'disproportionate effort' be clarified in a recital.

<sup>195</sup> DE suggested a new Article 17c on dispute settlement (7567/15). Supported by IE, FR and opposed by IT.

<sup>196</sup> DE suggested: "The controller shall inform the data subject about those recipients if the data subject requests this."

*Article 18*  
***Right to data portability***<sup>197</sup>

1. (...)

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<sup>197</sup> UK reservation: while it supports the concept of data portability in principle, the UK considers it not within scope of data protection, but in consumer or competition law. Several other delegations (DE, FR, IE, PL and SE) also wondered whether this was not rather a rule of competition law and/or intellectual property law or how it related to these fields of law. Therefore the UK thinks this article should be deleted.

SI: scrutiny reservation.

CZ thought its scope should be limited to social media.

DE and UK pointed to the risks for the competitive positions of companies if they were to be obliged to apply this rule unqualifiedly and referred to/raises serious issues about intellectual property and commercial confidentiality for all controllers. DE, FI, HU, SE and UK also underscored the considerable administrative burdens this article would imply. DE and FR referred to services, such as health services where the exercise of the right to data portability might endanger on-going research or the continuity of the service. Reference was also made to an increased risk of fraud as it may be used to fraudulently obtain the data of innocent data subjects (UK).

DE, ES, FR, HR, IE, PL and NO were in principle supportive of this right. SK thought that the article was unenforceable and DE, supported by HU, referred to the difficulty/impossibility to apply this right in 'multi-data subject' cases where a single 'copy' would contain data from several data subjects, who might not necessarily agree or even be known or could not be contacted, for example group photos. HU therefore questioned the added value of this right. CZ, DE, DK, FI, RO and NO thought that the exclusion of the public sector should be mentioned not only in recital 55, but also here (ES was opposed thereto).

ES, FI, FR, MT (7464/15) and RO, supported by Cion, wanted data portability to mean the transmission of data from one controller to another. However, a majority of delegations see the right to portability as the right to get at copy without hindrance and to transmit that data to another controller.

FI did not want an obligation for the systems of the controllers between whom data are transmitted to be interoperable. In response, Cion indicated that such obligation would not be created as it only concerns a right for a data subject to withdraw.



2. The data subject shall have the right to receive<sup>198</sup> the personal data<sup>199</sup> concerning him or her<sup>200</sup>, which he or she has provided to a controller<sup>201</sup>, in a structured and<sup>202</sup> commonly used<sup>203</sup> and<sup>204</sup> machine-readable format and have the right to transmit those data to another controller<sup>205</sup> without hindrance from the controller to which the data have been provided, where
- (a) the processing is based on consent pursuant to point (a) of Article 6(1) or point (a) of Article 9 (2) or on a contract pursuant to point (b) of Article 6 (1); and
- (b) the processing is carried out by automated means<sup>206</sup>.

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<sup>198</sup> FI, IE, IT preferred the term *withdraw*. BE, EL, HU, supported by Cion preferred *obtain*. UK reservation on "withdraw" considering that "withdraw" has the connotation of leaving no data behind and, therefore, duplicates the right to erasure. UK suggested instead "obtain (a copy for further use)". FR did not agree with the UK views considering it possible to use the right to erasure and data portability in parallel.

<sup>199</sup> PL suggested to specify that this pertained to personal data in their non-aggregated or non-modified form. DE also queried about the scope of this right, in particular whether it could extend to data generated by the controller or data posted by third persons.

<sup>200</sup> DE, FR wanted to re-insert the phrase "and any other information" considering that not having this phrase would decrease the scope of data portability too much.

CZ, DK, HR, IE, NL, SE supported not taking up "and any other related information."

<sup>201</sup> AT suggested instead the term "service provider" making also a suggestion for modification (8089/15).

EE suggested to delete "which he or she has provided to the controller".

<sup>202</sup> Consistency of language with Article 15(2).

<sup>203</sup> DE and FI queried whether this meant the scope was restricted to currently used formats (excluding future developments) and whether it implied an obligation for controllers to use one of these commonly used formats.

<sup>204</sup> PT thought 'and' should be deleted.

<sup>205</sup> CZ suggested to delete "and have the right to transmit those data to another controller."

<sup>206</sup> BE, DE, ES, IE and FR thought emphasis should be put on the right to withdraw data, also with a view to creating an added value as compared to the right to obtain a copy of personal data. CY and HU also thought the obligation of the controller should be emphasised.

2a. The exercise of this right shall be without prejudice to Article 17. The right referred to in paragraph 2 shall not apply to processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.<sup>207208</sup>

2aa. The right referred to in paragraph 2 shall **not apply if disclosing personal data would infringe** ~~be without prejudice to~~ intellectual property rights in relation to the processing of those personal data<sup>209</sup>.

[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).]<sup>210</sup>

4. (...) <sup>211</sup>.

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<sup>207</sup> IT: scrutiny reservation on last sentence.  
IE, supported by CY and Cion, suggested instead: "The right referred to in paragraph 2 shall not apply to processing carried out by public authorities or bodies".

<sup>208</sup> FR preferred wording related to the public purpose rather than to the public bodies.

<sup>209</sup> ES thought there should be an exception in case disproportionate efforts would be required.

<sup>210</sup> FR, HU, SE and UK reservation: this would better set out in the Regulation itself. SE did not see the need for this provision and meant that such measures for transmission could quickly be outdated; the paragraph should therefore be deleted. CZ supported the deletion of the paragraph. In contrast, COM saw the need to specify technicalities.  
DE suggested the EDPB instead of the Commission.

<sup>211</sup> Deleted in view of the new Article 83.

## SECTION 4

### RIGHT TO OBJECT AND AUTOMATED INDIVIDUAL DECISION MAKING ~~PROFILING~~

#### *Article 19*

#### ***Right to object***<sup>212</sup>

1. <sup>213</sup>The data subject shall have the right to object, on<sup>214</sup> grounds relating to his or her particular situation<sup>215</sup>, at any time to the processing of personal data concerning him or her which is based on points (...) (e)<sup>216</sup> or (f) of Article 6(1)<sup>217</sup>.

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- <sup>212</sup> DE, ES, AT, SI, SK and UK scrutiny reservation.  
AT made a suggestion for modification (8089/15).  
FR made suggestions to modify Article 19 (7464/15). Furthermore, FR wanted data subjects to have the right to object in case of processing for purposes covered by Article 9(2)(i) unless this processing is done for public interest purposes.  
PL did not want a right to object in relation to processing referred to in Article 83.
- <sup>213</sup> **FI, IE, UK suggested to use the wording of Article 14 of the directive currently in force.**
- <sup>214</sup> CZ, DE, FI, IE, UK reservation on deletion of "compelling legitimate" in Article 19(1). However, these delegations could accept re-insertion of (e) provided re-insertion of "compelling legitimate". CZ suggested: "1. The data subject shall have the right to object, at any time: (a) on compelling legitimate grounds to the processing of personal data concerning him or her which is based on point (e) of Article 6(1), (b) on grounds relating to his or her particular situation to the processing of personal data concerning him or her which is based on point (f) of Article 6(1).  
AT, DK, FR, MT, PL rejected "compelling legitimate" in the first line of the proposal in document 7978/1/15 REV1. Cion considered "compelling legitimate" not acceptable given Article 6(1)(f) and because it undermines making use of the right to object. This wording would allow that even compelling legitimate grounds of the data subject could be overridden by the controller; this would go below the protection level of Directive 96/46.
- <sup>215</sup> AT suggested to delete "relating to his or her particular situation" because the right to object is a fundamental human right.
- <sup>216</sup> The reference to point (e) of Article 6(1) was restored in view of the support PL, IT, DK, ES, DE, RO, SI, AT, EL, CY. Including (e) was objected by UK, DE, EE, BE, CZ, FI, HU and NL.  
COM stated that 1995 Directive contained a reference to point (e). UK, supported by DE, queried whether the right to object would still apply in a case where different grounds for processing applied simultaneously, some of which are not listed in Article 6. ES and LU queried why Article 6(1) (c) was not listed here. ES asked that a reference to Article 6(2) be added.
- <sup>217</sup> BG, FR, IT suggested to insert a reference to Article 6(4). In response, Cion noted that the points (e) and (f) cover both initial and further processing.

The controller shall *no longer process* the personal data (...) unless the controller demonstrates compelling legitimate grounds<sup>218</sup> for the processing which override the interests, (...) rights and freedoms of the data subject<sup>219</sup> or for *the establishment, exercise or defence of legal claims.*<sup>220221</sup>

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<sup>218</sup> DE: scrutiny reservation.

<sup>219</sup> SE scrutiny reservation: SE queried the need to put the burden of proof on the controller regarding the existence of compelling legitimate grounds. DE and FI queried the need for new criteria, other than those from the 1995 Directive. COM stressed that the link with the 'particular situation' was made in order to avoid narrow objections. CZ also stated that this risked making processing of data an exceptional situation due to the heavy burden of proof. SE queried whether the right would also allow objecting to any processing by third parties.

<sup>220</sup> Moved from paragraph (1a). UK proposed adding 'for demonstrating compliance with the obligations imposed under this instrument'. This might also cover the concern raised by DE that a controller should still be able to process data for the execution of a contract if the data were obtained further to a contractual legal basis. CZ, DK, EE, IT, SE and UK have likewise emphasised the need for allowing to demonstrate compliance. CZ and SK also referred to the possibility of further processing on other grounds.

<sup>221</sup> FR suggested to insert a new paragraph 1ab in order to allow data subjects to object to the further processing of his/her data based on Article 6(4). "Where the controller intends to further process the data on the basis of Article 6, paragraph 4 for other purposes than the one for which the data were collected, the possibility of the right to object shall be brought explicitly to the attention of the data subject and where an objection is upheld, the personal data shall no longer be processed."

- 1a. (...)
2. Where personal data are processed for direct marketing<sup>222</sup> purposes, the data subject shall have the right to object<sup>223</sup> (...) at any time to the processing of personal data concerning him or her for such marketing. At the latest at the time of the first communication with the data subject<sup>224</sup>, this<sup>225</sup> right<sup>226</sup> shall be explicitly brought to the attention of the data subject (...) and shall be presented clearly and separately from any other information<sup>227</sup>.
- 2a. Where the data subject objects to the processing for direct marketing purposes, the personal data shall no longer be processed for such purposes.

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<sup>222</sup> FR and UK underlined the need to have clarity regarding the exact content of this concept, possibly through a definition of direct marketing. DE asked which cases were covered exactly.

<sup>223</sup> DE suggested to insert: "free of charge".

<sup>224</sup> IT preferred "prior to processing".

<sup>225</sup> Suggestion by BE opposed by IE.

DE, supported by PL and preliminary BE and NL, suggested instead: "In approaching the data subject,".

<sup>226</sup> DE suggestion, supported by COM, to inform the data subject as soon as possible of the right to object.

<sup>227</sup> At the request of several delegations (FR, LT, PT), COM confirmed that this paragraph was not meant to create an opt-in system and that the E-Privacy Directive would remain unaffected. DE feels there is a need to clarify the relationship between Article 19(2) on the one hand and Article 6(1)(f) and Article 6(4) on the other. It can be concluded from the right to object that direct marketing without consent is possible on the basis of a weighing of interests. On the other hand, Article 6(1)(f) no longer refers to the interests of third parties and Article 6(4) also no longer refers to Article 6(1)(f) in regard to data processing which changes the original purpose. DE is therefore of the opinion that this also needs to be clarified in view of online advertising and Directive 2002/58/EC and Article 89 of the Proposal for a Regulation.

- 2aa. Where personal data are processed for **archiving purposes in the public interest or historical, statistical or scientific purposes** the data subject, on grounds relating to his or her particular situation<sup>228</sup>, shall have the right to object to 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<sup>229</sup> **or for compliance with a legal obligation to which the controller is subject.**
3. (...)
4. (...)

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228

HR scrutiny reservation.

Reservation: AT, CZ, DE, ES, LT, PT doubting the need for this paragraph. AT, PT noted that a data subject that finds out that a historical document is fake must have the possibility to object. Furthermore, given that statistics present aggregated data there is less of a protection need. CZ missed specificities about what the public interest is (supported by FI) and who is going to make the assessment. In response, Cion indicated that Article 6(3) specifies the determination what is in the public interest, namely Union or national law. DE, NL, UK scrutiny reservation. NL noted that processing can also be done in the public interests and for gainful purposes at the same time, for instance development of new pharmaceutical cures.

FI positive provided that Article 6 and 9 remain unchanged.

FR, HR, UK considered the references to public interest at the beginning and the end of the paragraph to be inconsistent.

IE missed a reference to enactment.

FR proposal to insert a new paragraph: 2b „Where personal data are processed for historical, statistical or scientific purposes 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. Prior to the processing, 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.”

Article 20

**Automated individual decision making**<sup>230</sup>

1. The data subject shall have the right not to be subject to a decision (...) based solely on automated processing, including profiling, which produces legal effects concerning him or her or significantly affects him or her.<sup>231</sup><sup>232</sup><sup>233</sup><sup>234</sup><sup>235</sup><sup>236</sup>

230

DE, ES, FR, AT, HU, PL, SE and UK scrutiny reservation.

DE found further changes needed to avoid that the Article would result in discrimination.

AT suggested: " Decision making on automated personal processing".

IT, supported by PT, reservation considering the concept of profiling laid down in the Presidency text too narrow. IT wanted to re-insert a definition of "profile" and to modify the definition of "profiling".

AT suggested to dispense with the concepts of profiling and profile in the text.

DE made a suggestion to add paragraphs to Article 20 (8089/15).

DE thinks this provision must take account of two aspects, namely, whether and under what conditions a profile (= the linking of data which permits statements to be made about a data subject's personality) may be created and further processed, and, secondly, under what conditions a purely automated measure based on that profile is permissible if the measure is to the particular disadvantage of the data subject. It appears expedient to include two different rules in this regard. According to DE Article 20 only covers the second aspect and DE would like to see a rule included on profiling in regard to procedures for calculating the probability of specific behaviour (cf. Article 28b of the German Federal Data Protection Act, which requires that a scientifically recognized mathematical/statistical procedure be used which is demonstrably essential as regards the probability of the specific behaviour). ES was not favourable to the new drafting and asked that the objective was. DE stressed that it was important to look at the definition of profiling in order to ensure consistency. IT said that the way the Article was drafted it dealt with decisions based on profiling and not profiling as a technique. IT noted that for example fingerprints and exchanges between machines would be more common in the future.

231

ES wanted to delete the words from *a decision* until *him or her*.

232

PL suggested "predominantly" instead of "solely".

233

AT suggested to delete profiling and replace it with "such" (8089/15).

Scrutiny reservation: SI.

234

CZ suggested to insert "similarly". In reaction, Cion indicated this would lower data protection standards.

235

PL suggested to clarify in a recital the meaning of "significantly affects him or her".

DE and PL wondered whether automated data processing was the right criterion for selecting high risk data processing operations and provided some examples of automated data processing operation which it did not consider as high risk. DE and ES pointed out that there are also cases of automated data processing which actually were aimed at increasing the level of data protection (e.g. in case of children that are automatically excluded from certain advertising). IT was concerned about the word *significantly* and wanted it clarified in a recital. COM meant that it could be clarified in a recital.

- 1a. Paragraph 1 shall not apply if the decision<sup>237</sup>: (...)
- (a) is necessary for entering into, or performance of, a contract between the data subject and a data controller (...)<sup>238</sup>; or
  - (b) is (...) authorized by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
  - (c) is based on the data subject's explicit consent (...).
- 1b. In cases referred to in paragraph 1a (a) and (c)<sup>239</sup> the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least<sup>240</sup> the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision<sup>241</sup>:
2. (...)

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<sup>236</sup> DE meant that the title and definition in Article 4(12a) required a particular need for clarification.

<sup>237</sup> COM suggestion.

<sup>238</sup> NL had proposed to use the wording 'and arrangements allowing him to put his point of view, inspired by Article 15 of Directive 95/46. BE suggested adding this for each case referred in paragraph 2. NL meant that profiling was more about transparency for the data subject.  
CZ reservation preferring the text in the 1995 Directive.

<sup>239</sup> IE suggestion.  
PL suggested instead to refer to "Article (1a)".

<sup>240</sup> BE suggestion, supported by FR.

<sup>241</sup> NL had proposed to use the wording 'and arrangements allowing him to put his point of view, inspired by Article 15 of Directive 95/46.



3. <sup>242</sup>Decisions referred to in paragraph 1a shall not (...) be based on special categories of personal data referred to in Article 9(1), unless points (a) or (g)<sup>243</sup> of Article 9(2) apply and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests<sup>244</sup> are in place.
4. (...)
5. (...)<sup>245</sup>

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<sup>242</sup> SK considered the paragraph to provide insufficient guarantees.

<sup>243</sup> UK did not want to limit processing to only points (a) or (g) so it suggested to delete the reference to points (a) and (g) whereas HU wanted to add point (c).

<sup>244</sup> BE, FR, IT, PL, PT, AT, SE and UK reservation FR and AT reservation on the compatibility with the E-Privacy Directive. BE would prefer to reinstate the term 'solely based', but FR and DE had previously pointed out that 'not ... solely' could empty this prohibition of its meaning by allowing sensitive data to be profiled together with other non-sensitive personal data. DE would prefer to insert a reference to the use of pseudonymous data.

<sup>245</sup> DE suggested new paragraphs 4-6 (7586/15) because of particular constitutional sensitivities. NL approved parts of it, especially paragraph 4 and thought that it was good to impose obligations on the controller.

## SECTION 5 RESTRICTIONS

### *Article 21*

### ***Restrictions***<sup>246</sup>

1. Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in (...) Articles 12 to 20 and Article 32, as well as Article 5<sup>247</sup> in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 20, when such a restriction constitutes a necessary and proportionate measure in a democratic society to safeguard:
  - (aa) national security;
  - (ab) defence;
  - (a) public security;
  - [(b) the prevention, investigation, detection and prosecution of criminal offences and, for these purposes, safeguarding public security<sup>248</sup>, or the execution of criminal penalties;]

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<sup>246</sup> DE suggested a new recital (48a) (7586/1/15 REV1).  
AT recalled the note of AT, SI, HU to the 3354th Council.  
SI and UK scrutiny reservation.

SE and UK wondered why paragraph 2 of Article 13 of the 1995 Data Protection Directive had not been copied here. DE, supported by DK, HU, RO, PT and SI, stated that para. 1 should not only permit restrictions of the rights of data subjects but also their extension. For example, Article 20(2)(b) requires that Member States lay down 'suitable measures to safeguard the data subject's legitimate interests', which, when they take on the form of extended rights of access to information as provided for under German law in the case of profiling to assess creditworthiness (credit scoring), go beyond the Proposal for a Regulation.  
<sup>247</sup> AT reservation.

<sup>248</sup> The wording of points (b), and possibly also point (a), will have to be discussed again in the future in the light of the discussions on the relevant wording of the text of the Data Protection Directive for police and judicial cooperation.

- (c) other important objectives of general public interests of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including, monetary, budgetary and taxation matters, public health and social security, the protection of market stability and integrity;
- (ca) the protection of judicial independence and judicial proceedings;
- (d) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;
- (e) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (aa), (ab), (a), (b), (c) and (d);
- (f) the protection of the data subject or the rights and freedoms of others;
- (g) the enforcement of civil law claims.

2. Any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to the purposes of the processing or categories of processing, the categories of personal data, the scope of the restrictions introduced, the specification of the controller or categories of controllers, the storage periods and the applicable safeguards taking into account of the nature, scope and purposes of the processing or categories of processing and the risks for the rights and freedoms of data subjects.