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NOTE

From:	Presidency
To:	Working Group on Information Exchange and Data Protection (DAPIX)
No. Cion doc.:	5853/12
Subject:	Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) - Delegated and implementing acts

The Commission proposal for a General Data Protection Regulation contains 26 delegated acts and 22 implementing acts. In the Presidency compromise text the majority of delegated acts and implementing acts have not been retained or replaced by an alternative, such as a providing more details in the regulation itself or leaving these rules to be worked out in codes of conduct.

Delegated acts

Recital 129 of the Commission proposal states that the power to adopt delegated acts should be given to the Commission in accordance with Article 290 TFEU in order to protect the fundamental right to data protection and to ensure the free movement of personal data within the Union. The Commission proposal provided for delegated acts in Articles 6(5), 8(3), 9(3), 12(5), 14(7), 15(3), 17(9), 20(5), 22(4), 23(3), 26(5), 28(5), 30(3), 31(5), 32(5), 33(6), 34(8), 35(11), 37(2), 39(2), 43(3), 44(7), 79(7), 81(3), 82(3), 83(3).

The delegated acts that have been fully or partially retained in the Presidency compromise text compared to the Commission proposal are laid down in Article 39a(7), which is partly between square brackets, as well as Article 8(3), Article 43(3) and Article 79a(4) which have been placed fully between square brackets. The Commission has a reservation on the deletion of Article 9(3) and Article 26(5).

Implementing acts

Recital 130 states that implementing acts are required in order to ensure uniform conditions for the implementation of the Regulation. Neither delegated nor implementing acts are a precondition for the application of the Regulation. The Commission proposal provided for implementing acts in the Articles 8(4), 12(6), 14(8), 15(4), 18(3), 23(4), 28(6), 30(4), 31(6), 32(6), 33(7), 34(9), 38(4), 39(3), 41(3), 41(4), 41(5), 42(2)(b), 43(4), 55(10), 62(1) and 62(2). These implementing acts are listed in recital (131).

The implementing acts that have been fully or partially retained or added in the Presidency compromise text compared to the Commission proposal are laid down in Article 26(2b), Article 38(4), Article 39a(8), Article 41(3), Article 41(3a), Article 41(5), Article 42(2)(b) and (c), Article 42(5b), Article 43(4), Article 55(10) and Article 62(1)(d). Furthermore, Article 18(3) is placed between square brackets. The Commission has a reservation on the deletion of Article 31(6), Article 32(6) and Article 62(1)(a), (b) and (c).

Against this background, the Presidency suggests to remove the square brackets from the provisions concerning delegated and implementing acts and invites delegations:

1. as regards delegated acts, to endorse:

- a. the delegated acts set out in Article 8(3), Article 39a(7), Article 43(3) and Article 79a(4);*
- b. not taking up all other provisions on delegated acts contained in the Commission proposal, including Article 9(3) and Article 26(5) taking into account the reservation of the Commission on the deletion of these two provisions.*

2. as regards implementing acts, to endorse:

- a. the implementing acts set out in Article 18(3), Article 26(2b), Article 38(4), Article 39a(8), Article 41(3), Article 41(3a), Article 41(5), Article 42(2)(b) and (c), Article 42(5b), Article 43(4), Article 55(10) and Article 62(1)(d);*
- b. not taking up all other provisions on implementing acts contained in the Commission proposal, including Article 31(6), Article 32(6) and Article 62(1)(a), (b) and (c) taking into account the reservation of the Commission on the deletion of these provisions.*

129) In order to fulfil the objectives of this Regulation, namely to protect the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data and to ensure the free movement of personal data within the Union, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission. In particular, delegated acts should be adopted in respect of ~~lawfulness of processing; specifying the criteria and conditions in relation to the consent of a child; processing of special categories of data; specifying the criteria and conditions for manifestly excessive requests and fees for exercising the rights of the data subject; criteria and requirements for the information to the data subject and in relation to the right of access; the right to be forgotten and to erasure; measures based on profiling; criteria and requirements in relation to the responsibility of the controller and to data protection by design and by default; a processor; criteria and requirements for the documentation and the security of processing; criteria and requirements for establishing a personal data breach and for its notification to the supervisory authority, and on the circumstances where a personal data breach is likely to adversely affect the data subject; the criteria and conditions for processing operations requiring a data protection impact assessment; the criteria and requirements for determining a high degree of specific risks which require prior consultation; designation and tasks of the data protection officer; codes of conduct;~~ criteria and requirements for certification mechanisms; criteria and requirements for transfers by way of binding corporate rules; ~~transfer derogations;~~ administrative sanctions; ~~processing for health purposes; processing in the employment context and processing for historical, statistical and scientific (...) purposes.~~ It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.

130) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission for: ~~specifying standard forms in relation to the processing of personal data of a child; standard procedures and forms for exercising the rights of data subjects; standard forms for the information to the data subject; standard forms and procedures in relation to the right of access; the right to data portability; standard forms in relation to the responsibility of the controller to data protection by design and by default and to the documentation; specific requirements for the security of processing; the standard format and the procedures for the notification of a personal data breach to the supervisory authority and the communication of a personal data breach to the data subject; standards and procedures for a data protection impact assessment; codes of conduct; forms and procedures for prior authorisation and prior consultation;~~ technical standards and mechanisms for certification; the adequate level of protection afforded by a third country or a territory or a processing sector within that third country or an international organisation; adopt standard data protection clauses; formats and procedures for the exchange of information between controllers, processors and supervisory authorities for binding corporate rules; disclosures not authorized by Union law; mutual assistance; ~~joint operations; decisions under the consistency mechanism; the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board.~~ Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers¹. In this context, the Commission should consider specific measures for micro, small and medium-sized enterprises.

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

- 131) The examination procedure should be used for the adoption of **implementing acts on codes of conduct; specifying standard forms in relation to the consent of a child; standard procedures and forms for exercising the rights of data subjects; standard forms for the information to the data subject; standard forms and procedures in relation to the right of access; the right to data portability; standard forms in relation to the responsibility of the controller to data protection by design and by default and to the documentation; specific requirements for the security of processing; the standard format and the procedures for the notification of a personal data breach to the supervisory authority and the communication of a personal data breach to the data subject; standards and procedures for a data protection impact assessment; forms and procedures for prior authorisation and prior consultation;** technical standards and mechanisms for certification; the adequate level of protection afforded by a third country or a territory or a processing sector within that third country or an international organisation; **formats and procedures for the exchange of information by electronic means between controllers, processors and supervisory authorities for binding corporate rules;** disclosures not authorized by Union law; mutual assistance; ~~joint operations; decisions under the consistency mechanism,~~ given that those acts are of general scope.
- 132) The Commission should adopt immediately applicable implementing acts where, in duly justified cases relating to a third country or a territory or a processing sector within that third country or an international organisation which does not ensure an adequate level of protection and relating to matters communicated by supervisory authorities under the consistency mechanism, imperative grounds of urgency so require.

Delegated acts

Article 8

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

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

Article 39a

Certification body and procedure

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

Article 43

Binding corporate rules

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

² DE, ES, FR, SE and UK suggested deleting this paragraph. CZ suggested adding "and for identifying that a service is offered directly to a child". DE, supported by BE and FR, suggested giving the EDPB the power to issue guidelines in this regard.

³ CZ, IT, SE and NL reservation. FR scrutiny reservation regarding (public) archives. RO and HR thought the EDPB should be involved. PL and COM wanted to keep paragraph 3.

Article 79a

Administrative fines

4. ¶The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of adjusting the maximum amounts of the administrative fines referred to in paragraphs 1, 2 and 3 to monetary developments, taking into account the criteria referred to in paragraph 2a of Article 79.⁴

Implementing acts

Article 18

Right to data portability

- ¶3. The Commission may specify (...) the technical standards, modalities and procedures for the transmission of personal data pursuant to paragraph 2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).⁵

⁴ CZ, DE, NL and RO reservation. NL that thought that guidelines from the EDPB could solve the problems on the amounts. CZ wanted to delete the paragraph and thought that the DPA could set out the amounts.

⁵ FR, HU, SE and UK reservation: this would better set out in the Regulation itself.

Article 26

Processor

- 2b. The Commission may lay down standard contractual clauses for the matters referred to in paragraph 2 and 2a and in accordance with the examination procedure referred to in Article 87(2)⁶.

Article 38

Codes of conduct

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

Article 39a

Certification body and procedure

8. The Commission may lay down technical standards for certification mechanisms and data protection seals and marks and mechanisms to promote and recognize certification mechanisms and data protection seals and marks. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 87(2)⁷.

⁶ PL was worried about a scenario in which the Commission would not act. CY and FR were opposed to conferring this role to COM (FR could possibly accept it for the EDPB).

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

Article 41

Transfers with an adequacy decision

3. The Commission, after assessing the adequacy⁸ of the level of protection, may decide that a third country, or a territory or one or more specified sectors within that third country, or an international organisation ensures an adequate level of protection within the meaning of paragraph 2. (...) ⁹. The implementing act shall specify its territorial and sectoral application and, where applicable, identify the (independent) supervisory authority(ies) mentioned in point (b) of paragraph 2. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 87(2)¹⁰.

⁸ CZ, RO and SI reservation on giving such power to the Commission. DE thought that stakeholders should be involved in this process. NL and UK indicated that on this point the proposal seemed to indicate a shift from the 1995 Data Protection Directive, which put the responsibility for assessing a third country's data protection legislation in the first place with the controller who wanted to transfer personal data.

⁹ CZ, DE, DK, HR, IT, NL, PL, SK and RO thought an important role should be given to the EDPB in assessing these elements. COM has pointed out that there can be no additional step in the Comitology procedure, in order to be in line with the Treaties and Regulation 182/2011.

¹⁰ DE queried the follow-up to such decisions and warned against the danger that third countries benefiting from an adequacy decision might not continue to offer the same level of data protection. COM indicated there was monitoring of third countries for which an adequacy decision was taken.

- 3a. *Decisions adopted by the Commission on the basis of Article 25(6) (...) of Directive 95/46/EC shall remain in force until amended, replaced or repealed by the Commission¹¹ in accordance with the examination procedure referred to in Article 87(2)¹².*
5. The Commission may decide that a third country, or a territory or a specified sector within that third country, or an international organisation no longer ensures an adequate level of protection within the meaning of paragraph 2 and may, where necessary, repeal, amend or suspend such decision without retro-active effect. The implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2) or, in cases of extreme urgency (...), in accordance with the procedure referred to in Article 87(3)¹³. (...)

Article 42

Transfers by way of appropriate safeguards

2. The appropriate safeguards referred to in paragraph 1 may be provided for (...), without requiring any specific authorisation from a supervisory authority, by:
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- (b) standard data protection clauses adopted by the Commission (...) in accordance with the examination procedure referred to in Article 87(2)¹⁴; or
- (c) standard data protection clauses adopted by a supervisory authority (...) and adopted by the Commission pursuant to the examination procedure referred to in Article 87(2).
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¹¹ Moved from paragraph 8. CZ and AT thought an absolute maximum time period should be set (sunset clause), to which COM was opposed. NL, PT and SI thought this paragraph 3a was superfluous or at least unclear. Also RO thought that, if maintained, it should be moved to the end of the Regulation.

¹² DE and ES suggested to request the Board for an opinion. COM has pointed out that there can be no additional step in the Comitology procedure, in order to be in line with the Treaties and Regulation 182/2011. DE asked if a decision in paragraph 3a lasted forever. IE considered paragraph 3a providing necessary flexibility. CZ thought that new States should not be disadvantaged compared to those having received an adequacy decision under Directive 1995.

¹³ FR and UK suggested the EDPB give an opinion before COM decided to withdraw an adequacy decision.

¹⁴ FR reservation on the possibility for COM to adopt such standard clauses.

- 5b. *Authorisations by a Member State or supervisory authority on the basis of Article 26(2) of Directive 95/46/EC shall remain valid until amended, replaced or repealed by that supervisory authority¹⁵. Decisions adopted by the Commission on the basis of Article 26(4) of Directive 95/46/EC shall remain in force until amended, replaced or repealed by the Commission¹⁶ in accordance with the examination procedure referred to in Article 87(2)¹⁷.*

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Article 43

Binding corporate rules

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

Article 55

Mutual assistance

10. The Commission may specify the format and procedures for mutual assistance referred to in this article and the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board, in particular the standardised format referred to in paragraph 6. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2)¹⁸.

¹⁵ UK and ES disagreed with the principle of subjecting non-standardised contracts to prior authorisation by DPAs. IT was thought that this was contrary to the principle of accountability. DE emphasised the need of monitoring.

¹⁶ AT thought an absolute time period should be set.

¹⁷ DE and ES have suggested to request the Board for an opinion. COM has pointed out that there can be no additional step in the Comitology procedure, in order to be in line with the Treaties and Regulation 182/2011.

¹⁸ DE, IT, EE and CZ reservation.

Article 62
Implementing acts

1. The Commission may adopt implementing acts of general scope for:
 - (a) (...) ¹⁹;
 - (b) (...);
 - (c) (...);
 - (d) specifying the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board, in particular the standardised format referred to in Article 57(5) and (6) and in Article 58(8).

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

¹⁹ COM reservation on deletion.

CHAPTER X

DELEGATED ACTS AND IMPLEMENTING ACTS²⁰

Article 86

Exercise of the delegation

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

²⁰ COM reservation on the deletion of empowerments for delegated acts or implementing acts.

Article 87

Committee procedure

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