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to: Working Party on Data Protection and Exchange of Information
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Subject: General Data Protection Regulation: Flexibility for the Public Sector

1. At the December 2012 meeting of the JHA Council, it was agreed that the question as to whether and how the Regulation can provide flexibility for the Member States' public sectors would be decided following completion of the first reading of the text. The purpose of this Presidency paper is to provide the basis for an exploration and discussion of Member States' requirements in this area.
2. The draft Regulation already contains provisions which are specifically tailored to the needs of public authorities and bodies in their capacities as controller or processor. This paper includes references to these specific provisions and to other provisions which have been identified by Member States as in need of amendment in their oral comments and written submissions.

Scope of regulation

3. Article 2.2 provides that the Regulation does not apply to the processing of personal data which falls outside the scope of Union law. However, some further precision is required as to what is intended to remain outside its scope.

Lawfulness of processing

4. In article 5.1, sub-paragraphs (c) and (d) permits the processing of personal data where it is necessary for compliance with a legal obligation to which the controller is subject and where it 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. Paragraph 3 of article 6 specifies that the basis for such processing must be provided for in Union law or the law of the Member State.
5. Recital 18 allows Member States to apply their national legislation on access to public documents, which may imply the disclosure of personal data.
6. The Regulation proposes that the ‘legitimate interests’ ground in sub-paragraph (f) should not apply to processing carried out by public authorities in the performance of their tasks. Many Member States have requested the removal of this restriction in their submissions on article 6.
7. Article 6.2. permits the processing of personal data which is necessary for the purposes of historical, statistical and scientific research purposes subject to the conditions set out in article 83. Many Member States have requested the removal of the reference to ‘research’ so that processing for historical purposes (especially for archives), statistical purposes and scientific purposes will be permitted subject to safeguards. This kind of processing often takes place by public authorities; in particular where national archives are concerned. The Statistics Committee has submitted proposals for specific changes.
8. Article 7.4. provides that consent shall not provide a legal basis for processing where there is a significant imbalance between the position of the data subject and the controller. This will restrict the availability of consent ground as a legal basis for transactions between citizens and state authorities and bodies, as confirmed in recital 34.

9. The conditions applicable to the processing of special categories of personal data are set out in article 9. Recognition of the role of Union law and Member State law are contained in paragraph 2 (a), (b), (g) and (j).

Rights of data subjects

10. Article 14.5 (c) provides that the paragraphs 1 to 4 of that article do not apply in cases where the data are not collected from the data subject and recording or disclosure is required by law.

11. Articles and 17 and 18 contain proposals for a ‘right to be forgotten’ and a right to data portability respectively. However, it remains unclear how far these rights are relevant for, and intended to apply in the case of, personal data processed by public authorities and bodies.

12. As regards the restrictions on profiling measures in article 20, paragraph 2 (b) already provides that a person may be subjected to such a measure if it is expressly authorised by a Union or Member State law which also lays down suitable measures to safeguard the data subject’s legitimate interests.

13. Article 21 permits Union or Member State law to restrict the scope of various rights and obligations in order to safeguard certain public interests where this is necessary in a democratic society. It remains to be discussed whether the areas listed in paragraph 1 are adequate or need to be expanded to take account of other public policy areas, e.g. fiscal, budget and customs data. Related questions are whether the exclusion of a policy area implies that there are no (EU) data protection requirements at all and whether the restrictions on the basis of Article 21 can pertain only to the rights set out in Chapter III (and Article 32) or could also cover other Chapters of the Regulation.

Data protection impact assessment

14. Article 33.5 provides that where the controller is a public authority or body and where the processing results from a legal obligation under article 6.1 (c) and is regulated under Union law, the requirement to carry out an impact assessment does not apply. This exemption should also apply where the public authority or body operates under Member State law. The issue also arises as to whether the exemption should apply where the processing is based on article 6.1 (e).

Prior consultation

15. Article 34.7 requires Member States to consult with the supervisory authority during the preparation of legislative measures, and schemes based on such measures, which involve the processing of personal data in order to ensure compliance with the Regulation and mitigate the risks involved for data subjects. It will be important to ensure that the scope of this obligation is clear and certain.

Data protection officer

16. Article 35.1 requires the designation of a data protection officer in every case where processing is carried out by a public authority or body. Paragraph 3 permits, in the case of a public authority or body, that a data protection officer may be designated for several of its entities. However, it does not allow several public authorities or bodies to share a data protection officer. Such an option would be valuable for small public authorities and bodies.

Transfers of personal data

17. Article 44.1 (d) permits the transfer of personal data to third countries or international organisations where the transfer is necessary for important grounds of public interest. Paragraph 5 specifies that the public interest in such cases must be recognised in Union law or in the law of the Member State to which the controller is subject. Paragraph 1 (g) may also provide the possibility for transfers in some cases.

18. The issue that arises is whether these provisions are sufficient to permit the public authorities and bodies of Member States to discharge their reporting and other obligations under international legal instruments and other agreements. Moreover, does the power of the supervisory authority under article 53.1 (h) to suspend data flows to a recipient in a third country or to an international organisation also apply to such reporting and other obligations?

Independent supervisory authorities

19. Chapter VI includes several articles which permit a broad margin of flexibility for Member States concerning the establishment and appointment of their supervisory authorities. Article 56 provides for the application of national laws in cases where several supervisory authorities engage in joint operations.

Penalties and administrative sanctions

20. Article 78 appears to allow flexibility to Member States in relation to the specification of penalties other than administrative sanctions. As regards the latter, the position regarding imposition of financial penalties on public authorities and bodies remains to be clarified. National law in some Member States does not permit such penalties on public authorities and bodies.

Specific situations

21. Chapter IX contains articles which relate to the processing of personal data in specific situations. In article 80, Member States are required to make adequate provision for freedom of expression, while other articles permit Member States to adopt specific rules “within the limits of the Regulation”.

Next steps

22. Following discussion of the contents of this paper, the Presidency will reflect on how best to proceed and will report to the JHA Council on 7/8 March on progress made.