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THE EUROPEAN UNION**

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MI 354
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FREMP 47
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NOTE

from: Presidency

to: Working Party on Information Exchange and Data Protection (DAPIX)

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COMIX 61 CODEC 219

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)
- Application of General Data Protection Regulation to archives

1. The Presidency has prepared this short paper in order to facilitate a discussion at a future Dapix meeting of the concerns which have been expressed about the possible adverse impact which the proposed Regulation may have on archive-related activities within the Union.

2. The importance of archives has already been recognised at European Union level. For example, the Council Resolution of 6 May 2003 on archives in the Member States (2003/C 113/02) stressed the importance of archives for the understanding of the history and culture of Europe and for the democratic functioning of our societies. Council Recommendation of 14 November 2005 on priority actions to increase cooperation in the field of archives in Europe (2005/835/EC) outlined a series of measures with a view to increasing cooperation at European level in the field of archives.

3. Concerns have been expressed by the International Council on Archives (ICA) and the European Regional Branch of the Council (EURBICA) that the General Data Protection Regulation does not make sufficient provision for the protection of archival activity. These concerns must be taken seriously. The Presidency has met with representatives of both bodies and, arising from these discussions, is convinced that the concerns are well-founded and need to be examined further and addressed, where necessary, by means of appropriate amendments.

4. As regards the principles applicable to personal data processing in Article 5, specific provisions have been included which allow further processing of personal data for historical purposes - paragraph (b) - and storage for longer periods - paragraph (e) - subject to the conditions and safeguards referred to in Article 83. Several important questions arise therefore:

- o can the term 'historical purposes' be interpreted in a sufficiently broad to accommodate archive-related activities?
- o how appropriate is the exercise of data subject rights under Chapter III in the case of archives?
- o are the provisions of Article 83 well suited to archival activities?

5. The term “historical purposes” is not defined in the draft Regulation. While recital 125 refers generally to the processing of personal data for historical, statistical or scientific purposes, no further detail which would assist interpretation is provided. The Presidency considers that a new recital 125a should be inserted which would clarify that “historical purposes” includes archival activity.

6. As regards the exercise of data subject rights under Chapter III, draft provisions, which have yet to be discussed in detail, have been inserted in articles 15 (Right of access), 16 (Right to rectification), 17 (Right to be forgotten and erasure), 17a (Right to restriction of processing), 18 (Right to data portability) and 19 (Right to object) which are intended to restrict the exercise of these rights in cases where the data are processed only for historical, statistical or scientific pursuant to Article 83.

7. Article 83 contains a set of restrictive conditions under which personal data may be processed (including storage) for historical, statistical or scientific purposes. Paragraph 1 specifies that personal data may only be processed for these purposes if the purposes cannot be achieved by processing data which does not identify or permit identification of the data subject. Alternatively, the personal data may be processed provided the 'key' which would permit the attribution of information to an identified or identifiable data subject is kept separately. It is obvious that these restrictions are ill-suited for historical purposes, including archival activity.

8. The archives of Member States are generally governed by national laws which determine archival content, control of access and appropriate safeguards, e.g. restricted access in cases where such access would or might cause distress or danger to living persons on the ground that they contain information about individuals, or would or might be likely to lead to an action for damages for defamation.

9. Options for addressing the concerns which have been expressed should, therefore, include the possibility of dealing with archives in the same manner as freedom of speech and public access to official documents, i.e. a new Article which would state that personal data in archives may be processed in accordance with Union law or Member State law which reconciles such processing with the right to personal data pursuant to the Regulation.