



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 8 March 2012

7221/12

DAPIX 22

OUTCOME OF PROCEEDINGS

from: Working Party on Information Exchange and Data Protection (DAPIX)
on: 23-24 February 2012
Subject: Summary of discussions

1. Approval of the agenda

The agenda as set out in CM 1415/12 was adopted.

One delegation queried whether the Working Party on Information Exchange and Data Protection was the appropriate forum to discuss the General Data Protection Regulation, as this proposal was also based on an internal market legal basis (Article 114 TFEU) and should in its view therefore be discussed in an internal market working party. The General Secretariat explained that following the entry into force of the Lisbon Treaty COREPER had decided to make this Working Party competent for all data protection questions¹.

¹ 17653/09 POLGEN 239 JAI 931.

2. Comprehensive reform of EU data protection rules - Presentation by the Commission of the "data protection package" and general exchange of views

- **Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Safeguarding Privacy in a Connected World A European Data Protection Framework for the 21st Century"**
5852/12 DATAPROTECT 8 JAI 43 MI 57 DRS 10 DAPIX 11 FREMP 6
- **Proposal for a directive of the European Parliament and of the Council 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**
5833/12 DATAPROTECT 6 JAI 41 DAPIX 9 FREMP 8 COMIX 59 CODEC 217 + ADD 1 + ADD 2
- **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)**
5853/12 DATAPROTECT 9 JAI 44 MI 58 DRS 9 DAPIX 12 FREMP 7 COMIX 61 CODEC 219 + ADD 1 + ADD 2

The Commission presented the comprehensive data protection package, emphasising that the proposals were motivated both by the Commission's desire to stimulate growth (internal market) and by the need to protect fundamental rights throughout the European Union. Reference was made to the new legal basis for legislative measures under the Lisbon Treaty, Article 16 TEU, which, in the Commission's view, authorised the adoption of EU data protection legislation with regard to both cross-border exchanging of data and internal data processing operations. The Commission justified the need to overhaul the 1995 Data Protection Directive by referring to the enormous technological developments which had taken place since 1995 and to the global trend towards a digital economy.

The Commission representative pointed to a so-called quadrant of objectives underlying the Commission's proposals: (1) stimulating growth by building confidence as the result of using uniform data protection rules applicable throughout the European Union; (2) the protection of fundamental rights; (3) the adoption of legal instruments that are flexible enough to adapt to future technological developments; and (4) legal certainty.

The general comments made by delegations on the comprehensive data protection package focused on: (a) the need for a new data protection regime; (b) the form of the legislative instruments and techniques proposed by the Commission; (c) the scope of the legislative proposals, and (d) some aspects of the content of the proposed General Data Protection Regulation.

(a) The need for a new data protection regime;

There was a general consensus that the proposals met a real need for reform of the EU data protection regime, as it needed to be updated so as to be flexible enough to meet future challenges. Some delegations felt that the Commission should have been more radical in its proposal for overhauling the data protection regime and dared to abandon some of the existing main rules and concepts on data protection.

Many delegations had serious concerns that this newly proposed data protection regime, rather than simplifying the data protection rules as it intended, would result in an increased administrative burden on both the private and public sectors.

A number of delegations thought that the proposed Regulation did not distinguish sufficiently between the position of, and rules applicable to individuals, small and medium-sized enterprises (SMEs), large international enterprises and the public sector. As regards the private sector, several delegations argued that the number of employees a company employed should not be the decisive criterion for differentiating as to the applicability of a number of data protection rules, but that this should instead hinge on the data protection risk inherent in specific types of data processing operations. Some delegations strongly advocated a more risk-based approach for the future EU data protection regime.

(b) Form of the legislative instruments and techniques proposed by the Commission:

(i) the proposed replacement of the 1995 Directive by a Regulation

A significant number of delegations stated they would have preferred a Directive and some of these entered a scrutiny reservation¹ on the form of the proposed General Data Protection Regulation. It was argued by a few delegations that a Regulation was too prescriptive. One delegation thought that a Regulation might be appropriate for the private sector, but not for the public sector. By contrast, another delegation thought it would have been preferable to have brought the judicial and police sector under the scope of the Regulation too.

The Commission argued that the choice of a Regulation as a single instrument applicable throughout the European Union was an enormous advantage for companies active in several Member States (including SMEs), as they would no longer be obliged to adapt to different national legislation.

A few delegations supported the Commission in its choice of a Regulation.

(ii) delegated acts

Many delegations criticised the many instances in which the proposal delegated powers to the Commission to flesh out the rules of the General Data Protection Regulation through delegated acts. The recourse to delegated acts was criticised on account of the perceived unbalanced division of powers between the legislator (Council/Parliament) and the Commission, and also as this was thought to be undermining one of the main aims of the proposed Regulation, namely, to simplify data protection rules. The prospect that delegated acts could eventually lead to an (implicit) modification of national procedural legislation was considered unacceptable by one delegation.

¹ BE, DE, SI

(c) Scope of the legislative proposals

(i) material scope: areas covered

One delegation took the view that the Regulation should distinguish more clearly between the public and private sectors. Another delegation criticised the demarcation between the proposed Regulation and the Directive, on the grounds that the Directive would apply only in cases where the data processing by public authorities took place with a view to the prevention, detection, investigation and prosecution of offences or the execution of criminal penalties, whereas the same public authorities would sometimes handle the same data in the same "file" with a different purpose and those data processing operations would therefore fall outside the scope of the Directive. It was felt that the Directive should apply to all data processing operations by public authorities where the latter are exercising sovereign powers. The Commission replied that the same distinction had already applied before the Lisbon Treaty and considered that this was not a problem in itself.

Some delegations criticised the fact that the proposed Data Protection Directive would also apply to purely internal data processing operations. This was criticised both on legal grounds (alleged lack of EU competence on the basis of Article 16 TEU) and on factual grounds. It was argued, with reference to the subsidiarity principle, that there was no need to have EU rules on internal data processing operations in the area of police and judicial activities, as the absence thereof had not hampered judicial and police cooperation between the Member States. It was also stated that the Commission should have awaited the proper transposition and functioning of the 2008 Data Protection Framework Decision before proposing a new data protection regime for the JHA area. A few delegations argued that the establishment of data protection rules for internal data processing operations would eventually lead to EU approximation of rules investigative measures, which was considered undesirable and a potential impingement on criminal procedure rules. It was also queried whether such detailed legal measures were provided for by Article 16 TEU.

Some delegations referred to the possible conflict between data protection rules and (constitutional) rules on access to, and disclosure of public documents, which in their view was not adequately addressed in the proposed instrument. A possible conflict with the freedom of the press was also raised.

The possible overlap with the E-Privacy Directive was also highlighted by some delegations.

(ii) geographical scope

One delegation expressed strong reservations concerning the choice of criteria for determining the competence of the data protection authorities (DPAs) and thought that the option of making one DPA competent for all data processing operations carried out throughout the European Union by a particular data controller could lead to forum shopping and might distance the data subject from the competent DPA. In the same vein, another delegation wondered whether this might result in an excessive administrative burden on the DPA of some Member States. Some other delegations, however, expressly welcomed the so-called one-stop shop principle.

(d) Highlighted aspects of the content of the proposed General Data Protection Regulation

During the round of general comments, the following specific issues figured most prominently:

Whilst welcoming the concepts of privacy by design and the attention to privacy-enhancing technologies, some delegations queried whether the proposed Data Protection Regulation was sufficiently technology-neutral.

Some delegations expressed concerns as to the technical feasibility of concepts such as the right to be forgotten and the right to data portability.

A few delegations considered the rules on the data protection officers (DPOs) to be too prescriptive. It was also stressed that the DPOs could find themselves with conflicting roles if they were meant to perform controlling tasks whilst maintaining an independent stance.

The increased role of the data protection authorities (DPAs) in the draft regulation was welcomed, however the increased tasks of the DPAs would inevitably have to be matched by a substantial increase of their staff and budget, which was not easy at a time of economic crisis and austerity of public budgets.

Several delegations said the sanctions provided by the draft regulation were too heavy, especially for SMEs. In this regard, the double jeopardy (*ne bis in idem*) risk of having the same conduct sanctioned twice, was also raised.

3. General Data Protection Regulation

The proposal is subject to a general scrutiny reservation by all delegations and, in addition, a parliamentary scrutiny reservation by HU, NL and PL.

- **Article-by article discussion (Articles 1-21)**

Delegations discussed Articles 1 to 4. The outcome of these discussions will be set out in a separate Presidency note to be issued later.

4. Any other business

No items were raised under this heading.