Informal Justice and Home Affairs Ministers’ meeting
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Discussion Paper

General Data Protection Regulation: application to the public sector

I. Background

1. The Commission has proposed a Regulation to replace the 1995 Data Protection Directive in order to create a level playing field in terms of data protection legislation. This goal already underlies the 1995 Directive, which, according to the ECJ, should be interpreted as seeking to generally achieve complete harmonisation. This harmonisation goal is important both for private and public sectors, although more relevant for the private one. Indeed that Directive is the backbone of data protection in the Union also for the public sector, for example in the field of asylum and migration, recognition of professional qualification, etc. The right to the protection of personal data in the Charter of Fundamental Rights does not draw any distinction between the private and public sector.

2. Some Member States have pleaded for more flexibility regarding data protection rules for the public sector so as to enable them to specify these rules within their national regimes. If authorities in different Member States were to apply different data protection standards, this might constitute an obstacle to the exchange of information between those authorities and to the free movement of data as required by Article 16 TFEU, but this could be remedied by maintaining the free movement clause (Article 1(3) of the draft Regulation).

3. At the JHA Council in December 2012, it was concluded that the question as to whether and how the Regulation could provide flexibility for the Member States’ public sector, would be decided following the completion of the first examination of the text of the
draft Regulation. Beyond what has been proposed by the Commission, the draft GDPR now contains provisions which are specifically tailored to the needs of public authorities and bodies in their capacities as controllers and processors. It already provides differentiations in a number of articles for public authorities and bodies and for non public ones. In some instances (e.g. the right to be forgotten, the right to object or the right to data portability), application to the public sector has been excluded. Also the one-stop-shop mechanism does not apply to public authorities and bodies.

II. Different legal techniques used

4. At a general level three different techniques have been introduced in the Regulation to offer certain leeway to the Member States' public sector to modulate the requirements of the Regulation in accordance with specificities of their constitutional, legal and institutional set-up.

a. Detailing the scope of national law as a legal basis for data processing

5. First, the Regulation does not require Member States to abrogate specific laws in data protection in the public sector. On the contrary, it allows Member States to specify the rules of the Regulation for certain areas of the public sector. The current wording of Art. 6 (3) indicate what type of details may be specified by national or Union law in order to ensure the appropriate level of protection. This clarifies that Member States may lay down a number of further specifications in their domestic law as far as they do not derogate from the rules laid down in the GDPR. For instance it is possible for Member States to determine in their national law specific cases of further processing or cases of profiling which would meet the criteria laid down in the Regulation although it is unclear whether they can adopt more protective provisions in this regard. The Member States can in the future adopt more specific laws, as far as there is no contradiction with the Regulation.

b. Restricting data protection rights and obligations by national law

6. A second legislative technique is that of Article 21, which allows Member States through national law to restrict certain rights and obligations when such restriction constitutes a necessary and proportionate measure in a democratic society to safeguard a number of public interests as well as the protection of the data subject and the rights and
freedoms of others. However, it does not allow a Member State to lay down a higher level of data protection.

c. Specific data protection regimes

7. Thirdly, Chapter IX of the GDPR provides for a number of specific data protection rules for specific types of processing covering activities in the public sector, such as the public access to official documents, the processing of a national identification number, employment, health-related purposes, social protection, and archives in the public interest. The discussion on which processing areas should be listed in Chapter IX needs to be continued. The difficulties to list all the possible areas in which specific data protection rules may be needed should be considered together with the general criteria provided by Articles 6 (3) and 21.

III. Possible ways forward

8. Should delegations require further elements for modulating the approach to data protection in public sector, the question needs to be examined whether further ways can be found to accommodate the above concerns regarding, on the one hand, the possibility to further specify or derogate, by national law, from the rules of the Regulation applicable to the public sector and, on the other hand, how such specifications or derogations should be framed. Therefore other alternatives such as the ones listed hereafter will need to be looked into.

a. Provide for a higher level of protection through the provision of minimum harmonisation for the public sector

9. Instead of providing for full harmonisation as in the existing Directive, consideration could also be given to allowing Member States to provide for a higher level of protection under national law. However, this would reduce the level of harmonisation achieved by the existing Directive.

10. One could possibly envisage different levels of harmonisation within the draft Regulation with regard to processing operations performed for the public interest, by expanding the possibility to provide for restrictions to data protection principles and individuals rights, as set forth under Article 21. However, it should be clear that the provision of different levels of data protection for such processing operations should not
hinder the free movement of data across the EU. Secondly, such derogations from the
general level of harmonisation set forth in the regulation should meet several well-
known and received criteria applying to legislation that impacts on fundamental rights.

b. **Provide more sectors where Member States can establish specific or derogatory
data protection regimes**
11. An option would be to explicitly list in Chapter IX additional areas in which Member
States could provide for higher levels of data protection. It may prove to be very
difficult, if not impossible, to list the activities for which Member States would be
allowed to provide for specific national rules of data protection. It may also be
necessary to specify which rules of the Regulation could be, in that case, derogated
from, instead of employing the generic condition “within the limits of this Regulation”,
as this creates uncertainty regarding the exact implication of the specific rules set out in
Chapter IX.

c. **Clarify the legislative powers of Member States**
12. One option would be to give more ‘visibility’ to the legislative powers that Member
States will retain in the field of data protection following the adoption of the GDPR.
This could be done by moving the text which is currently in Article 6(3) to Article 1 of
the draft Regulation and in addition further claryfing in a recital the articulation between
the Regulation and the national rules applicable to the public sector.

d. **Different data protection instruments for the public and the private sector**
13. The extreme option to exclude the public sector from the scope of the draft Regulation
has several important drawbacks. A major legal difficulty is that there is no harmonised
notion of public sector in the Union and therefore how to demarcate the public sector
from the private sector. Whereas this may be relatively straightforward for public
authorities exercising sovereign powers, it is much more difficult when it comes to
entities controlled by the public sector, nevertheless providing services which are also
provided by the private sector, such as health care, education, culture, etc. For example,
health care in hospitals might be provided in one Member State by public services,
whereas in other Member States it could be predominantly provided by private actors.
This would however lead to further fragmentation of data protection and would be
contrary to the objective of the reform. At a political level, the Parliament will
undoubtedly not be willing to limit the scope of the draft Regulation..

IV. Questions

14. In light of the above, the Ministers are invited:

1) to indicate whether they are satisfied with the solutions achieved for the approach to the public sector in the draft GDPR as it currently stands.

2) if this is not the case, indicate which further elements of additional flexibility would be necessary for the public sector among those listed above:
   a. Provide for a higher level of protection for the public sector through the provision of minimum harmonisation in that sector.
   b. Provide more sectors where Member States can establish specific data protection regimes.
   c. Clarify the legislative powers of Member States with regard to data protection following adoption of the GDPR.
   d. Exclude the public sector from the scope of the Regulation.