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Legal Service

Brussels, 19 -10- 2012

LEGAL OPINION

Re: **LIBE - Proposal for a regulation 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) (COM(2012)11) - Relationship between the draft regulation and national laws - Delegated acts**

I. Introduction

1. By letter of 23 July 2012 (annexed), which arrived at the Legal Service on the same day, Mr Juan Fernando LÓPEZ AGUILAR, Chairman of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), requested a legal opinion regarding certain issues related to the proposal for a General Data Protection Regulation (hereinafter, "the draft regulation" or "the proposed regulation").[1]

2. The following specific questions under the title "*Question on the relationship between the draft Regulation and national laws*" were put to the Legal Service:

   "*1) What exactly does Article 6(3)(b) mean for the interaction and coexistence of national law and EU law, particularly with regard to existing national data privacy law in specific (public) sectors?*

   2) Is the Legal Service aware of any laws in Member States transposing Directive 1995/46/EC or otherwise regulating data protection which would have stronger protections for individuals than the ones contained in the draft regulation? If so, which are specific aspects of stronger protection, and could they be incorporated into the draft Regulation?

[1] 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), COM(2012)11 final - 2012/0011(COD).

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3) *What does "within the limits of the regulation" mean, given the fact that data protection is a fundamental right and therefore only should have limits for infringing it, not for protecting it? Does it mean that member states are not allowed to set rules with stronger data protection provisions? What would be necessary to allow member states to set such rules?*

4) *Would it be possible to insert one of the following amendments to Article 6(3)(b) and what would be the effect of that?*

a) "Within the limits of this Regulation, Member States may adopt by law specific rules regulating the processing of personal data in this context."

b) "Within the limits of this Regulation, Member States may adopt by law specific rules regulating the processing of personal data by a public authority, agency or body in this context."

5) *Would it be possible to extend Article 81 or Article 82 of the proposed Regulation to other sectors, or to introduce a new article in Chapter IX with a general clause allowing more specific laws by member states?*

6) *Would it be possible to insert the following Article to the proposed Regulation and what would be the effect?*

"Article X Stricter national rules for data processing by public authorities

(1) This Regulation shall not prevent Member States from maintaining any national rules for data processing by public authorities aimed at ensuring more extensive protection of personal data than those contained in this Regulation, provided they are in force at the time of the entry into force of this Regulation. Each Member State shall inform the Commission about such national rules twelve months after the date specified in Art. 90(1) at the latest. The Commission shall bring them to the attention of the other Member States.

(2) Member States may adopt national rules aimed at ensuring more extensive protection of personal data than those contained in this Regulation for data processing by public authorities. Each Member State shall inform the Commission about such national rules, within one year after their adoption at the latest. The Commission shall bring them to the attention of the other Member States."

3. In addition, the following specific questions under the title "*Question on delegated and implementing acts*" were put to the Legal Service:

"*1) Can the Legal Service provide an assessment which of these acts would clearly "supplement or amend certain non-essential elements" of the proposed regulation in the meaning of Article 290 TFEU?*

2) *Can the Legal Service provide an assessment of which of these acts would touch upon "essential elements" of the proposed regulation in the meaning of Article 290 TFEU?*

3) *Can the Legal Service give its opinion on the period of two months for a possible expression of objection, as foreseen in Article 86(5) of the proposed regulation, especially in view of the normal time taken for such decisions in the Parliament's procedures?*"

II. The proposed legal framework

4. The proposed regulation forms the first - and main - part of the new legal framework for the protection of personal data and their free movement within the Union, as proposed by the Commission. This act would repeal[2] and replace Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data[3] (hereinafter, "Directive 95/46/EC").

5. The second part of this new legal framework is the 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.[4] The proposed directive is not the subject of this legal opinion.

6. The proposed regulation is to be read in the light of the fundamental right to protection of personal data set out in Article 8 of the Charter of Fundamental Rights of the European Union (hereinafter, "the Charter"),[5] which is also referred to in recital 1 of the proposed regulation itself. The proposed regulation seeks to strengthen the rights of individuals,[6] including by taking into account new technological challenges to the protection of personal data.[7] The proposed regulation thereby also seeks to improve trust in technology and thus facilitate the free movement of data across the European Union,[8] in particular as regards the digital economy.[9]

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2 See Article 88(1) of the draft regulation.

3 Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.

4 COM(2012)10, 2012/0010(COD).

5 The Charter is binding on the legislature of the European Union, as it has the same normative rank as the Treaties themselves (see Article 6(1) of the Treaty on European Union, hereinafter, "TEU"). The right to protection of personal data under Article 8 of the Charter moreover has to be read and interpreted in the light of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, "the ECHR"), see Article 52(3) of the Charter.

6 See recital 2 of the proposed regulation.

7 See recital 5 of the proposed regulation.

8 See *ibid.*

9 See recital 6 of the proposed regulation.

III. Legal analysis

III.A. Questions on the relationship between the draft regulation and national laws

(a) Preliminary remarks

7. The relationship between the draft regulation and national laws must be examined, in particular, in the light of the legal basis and the objectives of the proposed regulation, as well as of the choice of the legal instrument (a regulation as opposed to a directive).

(i) On the legal basis for the proposed regulation

8. The proposed regulation is based, in particular,[10] on Article 16(2) of the Treaty on the Functioning of the European Union (hereinafter, "TFEU"), which states that "[t]*he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data* [...] *by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data.*"

9. It follows from this provision of the Treaty that rules adopted on its basis have a two-fold purpose: the protection of the fundamental right of individuals with regard to the processing of personal data and the elimination of restrictions on the free flow of personal data within the Union. These two purposes are also reflected in Article 1 of Directive 95/46/EC[11] and in Article 1 of the proposed regulation.

(ii) On the objectives of the proposed regulation

10. The currently applicable rules, as laid down in Directive 95/46/EC (which the proposed regulation would repeal), strive to establish complementarity between these two objectives.

11. Therefore, according to the Court of Justice of the European Union (hereinafter, "the Court"), Directive 95/46/EC aims to harmonise the national laws in this area, in a way which is "[...] *not limited to minimal harmonisation but amounts to harmonisation which is generally complete. It is upon that view that Directive*

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10 The other legal basis is Article 114(1) TFEU. According to the justification given in point 3.1., third paragraph, of the explanatory statement of the Commission proposal, "[t]*he reference to Article 114(1) TFEU is only necessary for amending Directive 2002/58/EC to the extent that that Directive also provides for the protection of the legitimate interests of subscribers who are legal persons*".

11 "*Article 1*
Object of the Directive
1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1."

95/46 is intended to ensure free movement of personal data while guaranteeing a high level of protection for the rights and interests of the individuals to whom such data relate".[12]

12. On the question from a national court seeking to know whether it was permissible for Member States to provide for greater protection for personal data or a wider scope than those required under Directive 95/46/EC, the Court replied that "[m]*easures taken by the Member States to ensure the protection of personal data must be consistent both with the provisions of Directive 95/46 and with its objective of maintaining a balance between freedom of movement of personal data and the protection of private life. However, nothing prevents a Member State from extending the scope of the national legislation implementing the provisions of Directive 95/46 to areas not included in the scope thereof provided that no other provision of Community law precludes it.*"[13] (Emphasis added).

13. These findings of the Court will also apply to the relationship between the national laws and the draft regulation, if adopted as proposed by the Commission. In this case, the margin of manoeuvre for the national laws in this area of law will become smaller, due to the choice of the legal instrument - that is, a regulation - and to the greater level of harmonisation it seeks to achieve (see below).

(iii) On the relationship between a regulation and national law

14. On the premise that Directive 95/46/EC did not prevent divergences and fragmentation between the national laws implementing it,[14] the Commission proposed this draft regulation, aiming to create a comprehensive and a homogenous level of protection in all Member States and to remove the obstacles to flows of personal data (see, *inter alia*, recitals 7, 8 and 11 of the proposed regulation).

15. In order to achieve these objectives, as regards the type of instrument chosen, the Commission proposal opts for a *regulation*. Contrary to a directive, a regulation is directly applicable in all Member States and confers rights directly on individuals (see Article 288(2) TFEU). Consequently, a regulation should not be transposed into national law.

16. According to the case-law of the Court, "*regulations are, as such, directly applicable in all Member States and come into force solely by virtue of their publication in the Official journal of the Communities* [...]. *Consequently, all methods of implementation are contrary to the Treaty which would have the*

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12 See Case C-101/01 *Lindqvist* [2003] ECR I-12992, paragraph 96. Note that the French language version of this paragraph reads as follows: "[...] *ne se limite donc pas à une harmonisation minimale, mais aboutit à une harmonisation qui est, en principe, complète. C'est dans cette optique que la directive 95/46 entend assurer la libre circulation des données à caractère personnel, tout en garantissant un haut niveau de protection des droits et des intérêts des personnes visées par ces données.*" (Emphasis added).

13 See *ibid*, paragraph 91.

14 See Commission Communication of 4 November 2010 on "a *comprehensive approach on personal data protection in the European Union*" COM(2010) 609 final, section 2.2.

result of creating an obstacle to the direct effect of Community regulations and of jeopardizing their simultaneous and uniform application in the whole of the Community [now: Union]."[15]

17. In this regard, the Court also ruled that, "*the uniform application of Community* [now: Union] *provisions allows no recourse to national rules except to the extent necessary to carry out the regulations.*"[16]

18. Consequently, according to this case-law, national legislation or other national acts of general application may only be maintained or adopted to the extent these national provisions are necessary to implement the regulation and implementing measures are not reserved to the Union level.

19. A regulation can, and may have to be implemented by national[17] or, where uniform implementation conditions are required,[18] by Union implementing measures.[19] Such implementing measures are not devoid of judicial control, and they must be in compliance with the legislative act they are implementing as well as with the Treaties.[20]

20. In particular, as stated in the case-law of the Court, to the extent national rules are in conflict with Union law, the general principle of primacy of Union law applies, whereby contravening national rules are inapplicable.[21]

21. On the other hand, it is not generally excluded to provide exemptions and/or derogations from a regulation in the text of the regulation itself,[22] including a power for Member States to apply specific rules derogating from certain of the regulation's provisions, if the margin of appreciation thus granted to the Member States is clearly limited and does not contradict the Treaties, nor the purpose of the legislative act as a whole.[23]

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15 See Case 39/72 *Commission* v *Italian Republic* [1973] ECR 101, paragraph 17.

16 See Case 39/70 *Norddeutsches Vieh- und Fleischkontor GmbH* v *Hauptzollamt Hamburg-St.Annen* [1971] ECR 49, paragraph 4.

17 See Article 291(1) TFEU.

18 See Article 291(2) TFEU.

19 An example of national implementing measures necessary for the implementation of the proposed regulation is Article 49 of the proposed regulation.

20 See Case C-403/05 *Parliament* v *Commission* [2007] ECR I-9045, paragraph 51, as regards Union implementing measures and Case 230/78 *Eridania* [1979] ECR 2749, paragraph 34, as regards national implementing measures. As for the term "Treaties", it is to be understood in this legal opinion as encompassing the TEU, the TFEU, the Charter and the general principles of Union law.

21 Cases 6/64 *Flaminio Costa* v *E.N.E.L.* [1964] ECR 1251, at page 1270; 106/77 *Staatliche Finanzverwaltung* v *Simmenthal* (II) [1978] ECR 629, paragraphs 17-18; joined Cases C-10/97 to C-22/97 *Minister dell Finance* v *IN. CO. GE. '90 U.A.* [1998] ECR I-6307, paragraph 21.

22 An example of such a derogation is in Article 21 of the proposed regulation.

23 See, for example, Article 19(4) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243, 15.09.2009, p. 1:
"*By way of derogation, an application that does not meet the requirements set out in paragraph 1 may be considered admissible on humanitarian grounds or for reasons of national interest*" (emphasis added).

(b) On the meaning of Article 6(3)(b) for the interaction of EU and national law

22. The national laws referred to in Article 6(3)(b) of the proposed regulation are those which provide a *basis* (in other words, a reason) for processing personal data. Thus, Article 6(3) of the proposed regulation expresses that the definition of legal obligations involving the processing of personal data and the tasks carried out by controllers in the public interest or in the exercise of official authority which impose processing of personal data, are to be found in Union law (Article 6(3)(a) of the proposed regulation), or - in practice, primarily - in national law.

23. The second subparagraph of Article 6(3) then specifies the conditions for such national laws, that is to say, that they must meet an objective of being in the public interest or be necessary to protect the rights and freedoms of others, respect the essence of the right to the protection of personal data, and be proportionate to the legitimate aim.

24. According to the recital 36 of the proposed regulation, "[i]*t is also for Union or national law to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public administration or another natural or legal person governed by public law, or by private law such as a professional association.*"

25. As a result, the proposed regulation leaves considerable room for national legislation, as regards the definition of legal obligations and of the tasks carried out by controllers in the public interest or in the exercise of official authority, which constitute a basis for a lawful processing of personal data.

26. This reference to national law in the draft regulation refers to national laws imposing obligations to collect or exchange personal data in different sectors (i.e. taxation law, social security law etc.), rather than to national general data protection law.

27. Therefore, Article 6(3)(b) of the proposed regulation does not provide a possibility for Member States to adopt rules deviating from those contained in the proposed regulation. Under the proposed regulation, as it stands now, the rules on *how* to process personal data are a matter reserved for the proposed regulation.

See, for another recent example, Article 8 of Regulation (EU) No 530/2012 of the European Parliament and of the Council of 13 June 2012 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, OJ L 172 , 30.06.2012, p. 3:
"*Exemptions for ships in difficulty or for ships to be repaired*
By way of derogation from Articles 4, 5 and 7, the competent authority of a Member State may, subject to national provisions, allow, under exceptional circumstances, an individual ship to enter or leave a port or offshore terminal or anchor in an area under the jurisdiction of that Member State, when:
(a) an oil tanker is in difficulty and in search of a place of refuge;
(b) an unloaded oil tanker is proceeding to a port of repair" (emphasis added).

(c) On national laws transposing Directive 95/46/EC

28. The responsibility for the control of the implementation of Directive 95/46/EC belongs to the Commission. Some information about national law transposing Directive 95/46/EC can be found in the Commission's Impact Assessment accompanying the draft regulation.[24]

29. A further useful source of information in this context is the Commission's First Report on the implementation of Directive 95/46/EC[25] and the technical analysis which accompanies it,[26] as well as the European Parliament's resolution issued thereupon.[27]

(d) On the formulation "within the limits of this Regulation"

(i) As regards the meaning of "within the limits of this Regulation"

30. The Legal Service understands the question on the meaning of the terms "*within the limits of this Regulation*" to refer to their use in the proposed regulation, as opposed to a request to interpret these terms *in abstracto*.

31. The expression "*within the limits of this Regulation*" appears in Articles 49(1), 81(1), 82(1), 83(1), 84(1) and in recitals 76, 124, 127 of the proposed regulation.

32. As regards Articles 49(1) and 84(1) of the proposed regulation, they are of an institutional character, relating to the powers of supervisory authorities. In this case, the expression "*within the limits of this Regulation*" defines the legal framework for the implementing acts to be adopted by the Member States. Its meaning is similar to the expressions: "*on the basis of this Regulation....*", or "*in application of this Regulation...*".

33. Article 82(1) of the proposed regulation concerns processing of employees' personal data in the employment context. It grants Member States permission to adopt by law specific rules regulating this matter. The expression "*within the limits of this Regulation*" prevents Member States from adopting specific rules which derogate from the proposed regulation's conditions for processing personal data.[28] Its meaning seems to be close to the expression: "*without prejudice to the other provisions of this Regulation...*"[29]

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24 SEC(2012) 72 final.

25 COM(2003) 265 final.

26 Analysis and Impact Study on the implementation of Directive 95/46/EC in the Member States [without document number], see http://ec.europa.eu/justice/policies/privacy/docs/lawreport/consultation/technical-annex_en.pdf.

27 European Parliament resolution of 9 March 2004 on the First Report on the implementation of the Data Protection Directive of 24 February 2004, T5-0141/2004, OJ C 102 28.04.2004, p. 30.

28 See recital 124 of the proposed regulation.

29 See, similarly, the recommendation to replace the expression: "*within the limits of this Regulation*" by the expression: "*without prejudice to this Regulation*" made by the European Data Protection Supervisor (EDPS) in his opinion of 7 March 2012 on the data protection reform package, paragraph 59.

34. The expression "*within the limits of this Regulation*" has the latter meaning in the case of Articles 81(1), and 83(1), too. As a result, the processing of personal data concerning health and for historical, statistical or scientific research purposes must respect, despite its specificities, the rules laid down in the draft regulation.

35. Consequently, in cases where implementing measures may be adopted by the Member States (in accordance with Articles 49(1), 81(1), 82(1) and 84(1) of the proposed regulation), the expression "*within the limits of this Regulation*" prevents the Member States from adopting rules which would derogate from the rules laid down in the draft regulation.

36. The fundamental rights framework does not change the outcome of this analysis. The expression "*within the limits of this Regulation*" does not limit by itself the fundamental right to the protection of personal data. From the fundamental rights' perspective, this expression is neutral, as its only aim is to ensure the compliance of national laws with the proposed regulation.

37. Moreover, it is worth mentioning that the right to protection of personal data set out in Article 8 of the Charter cannot be read as an absolute right,[30] because Article 52(1) and (3) of the Charter allows limitations thereof, in the light of the ECHR.[31] Limitations on the fundamental right to protection of personal data are therefore possible and can even be necessary in some cases. Article 8 of the Charter has to be balanced in each concrete case against other, competing fundamental rights, such as in particular the rights relating to access to documents laid down in Articles 41(2)(b) and 42 of the Charter.[32]

(ii) As to the relevance of "within the limits of this Regulation" for the potential possibility for Member States to set more stringent data protection rules

38. As explained above, the expression "*within the limits of this Regulation*" as used in the proposed regulation prevents the Member States from adopting not only less stringent rules on protection of personal data, but in addition it also prevents them from adopting more protective ones, as long as these national rules would derogate from any of the draft regulation's provisions.

39. However, the precise meaning and practical effect of the formulation depends on the concrete context in which it is used throughout the proposed regulation, as specified above for each operative provision where it appears.

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30 See recital 139 of the proposed regulation.

31 See the European Court of Human Rights, Application No. 9248/81, *Leander v. Sweden*, Judgment of 26 March 1987, Series A 116, paragraphs 49 *et seq.*

32 See Case C-28/08 P *Commission* v *Bavarian Lager* [2010] ECR I-6055, paragraph 78, which refers to this process in the particular context of the right to protection of personal data and the right of access to documents as follows: "*to weigh up the various interests of the parties concerned.*"

(iii) As to the conditions for Member States to be allowed to set more stringent data protection rules

40. As mentioned above, in principle, the legislature is not entirely prevented from providing, in a regulation, exceptions or derogations which give Member States a certain, specified leeway in the application thereof.

41. This finding in principle also applies to a provision which would generally grant Member States the possibility to set out more stringent rules within the scope of a regulation, although this could raise the question of the appropriateness of a regulation as opposed to a directive.

42. Currently, however, a general possibility to provide more stringent national rules on data protection is not foreseen in the proposed regulation as drafted by the Commission. In particular, "*within the limits of this Regulation*" cannot be read to provide such a possibility.

43. Given that there is no apparent link between the expression "*within the limits of this Regulation*" and the possibility for Member States to provide more stringent national rules on the protection of personal data, the concrete conditions for allowing such national rules will be more appropriately discussed in section (g) below, in the context of the amendment proposed in the request for this legal opinion.

(e) On the possibility to insert certain amendments as drafted in the request for the legal opinion in Article 6(3)(b) of the draft regulation

44. The suggested amendments to be inserted in Article 6(3)(b) of the draft regulation (lawfulness of processing) read as follows:

"a) Within the limits of this Regulation, Member States may adopt by law specific rules regulating the processing of personal data in this context.

b) Within the limits of this Regulation, Member States may adopt by law specific rules regulating the processing of personal data by a public authority, agency or body in this context."

45. These amendments seek to grant Member States the power to regulate, within the same scope of application, the same matters as the proposed regulation itself ("*rules regulating the processing of personal data*"), but do not allow Member States to derogate from the draft regulation.

46. As regards the provision in which the amendments are proposed to be introduced - Article 6(3)(b) of the draft regulation - it already contains a reference to national laws. However, as explained above, it refers to the national laws which will define legal obligations and tasks carried out by controllers in the public interest or in the exercise of official authority, thus creating a basis for a lawful processing of personal data in accordance with Article 6(1)(c) and (e) of the draft regulation.

47. The national laws referred to in Article 6(3)(b) have therefore a different purpose than those referred to in the above-mentioned amendments. The precise meaning and scope of these amendments therefore need to be clarified.

48. In this context, it is to be noted that Directive 95/46/EC already contains a similar provision, although clearly limited only to the rules on the lawfulness of processing of personal data - Article 5 - which reads: "*Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful.*"

49. Nevertheless, if one were to go beyond the scope of application of Article 6 of the draft regulation (lawfulness of processing) and to make more general and horizontal provisions for the interaction between Union and national data protection rules, this would more appropriately be a matter for the material scope of application (Article 2), the territorial scope of application (Article 3) or Chapter IX on specific data processing situations, not for the lawfulness of data processing as referred to in Article 6.

50. Concerning the choice of the legal instrument, this matter would perhaps need to be reconsidered, should these amendments be inserted in the proposal. As explained above, regulations have direct application so that, in compliance with the requirements of legal certainty, which is a general principle of Union law,[33] their provisions should be drafted in such a way that the addressees have no doubts as to the rights and obligations resulting from them. On the other hand, if provisions are addressed to the Member States and leave discretion as to their implementation, the appropriate legal instrument would be a directive and not a regulation.[34]

51. Finally, due to the very general drafting and broad discretion they grant to the Member States for the adoption of the rules within the same scope of application as that of the draft regulation, which could lead to further divergence in the national legislations in this area, the suggested amendments could undermine the purpose of the proposed regulation.

52. This purpose, as stated in its Article 1 and its preamble, is to achieve a more comprehensive and consistent level of protection of individuals with regard to the processing of personal data and to ensure the elimination of restrictions on the free flow of personal data within the Union (see above). It is to be recalled that this objective results from Article 16(2) TFEU.

53. The risk of contradiction with the purpose of the proposal as it is currently drafted is higher in the case of amendment a), which is very broad, than for amendment b), which is limited to the processing by public authorities. However, it has to be underlined that the draft regulation, as it stands now, does not make any distinction between the public or private sectors as regards the

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33 See Judgment of 10 May 2012 in joined Cases C-338 to 347/11 *Santander Asset Management*, paragraph 59.

34 See Article 288 TFEU and the Joint Practical Guide for the drafting of Community legislation, point 2.2.

processing of personal data, nor does it contain a definition of "*public authorities*".

54. In conclusion, if the above-mentioned amendments were to be introduced in the draft regulation, their scope and meaning would have to be clarified. Moreover, it would have to be ensured that they remain consistent with the purpose of the act as a whole.

(f) On the possibility to extend Article 81 or Article 82 of the proposed regulation to additional sectors or to introduce a new, similar article

55. The rules provided for in Article 82 of the proposed regulation, which allow the Member States to adopt some specific rules in the employment context, could potentially be extended to other limited sectors. Alternatively, a new provision could be included in Chapter IX "*on specific data processing situations*", to this effect. In any case, the reasons for this extension would have to be clearly stated in the recitals of the proposed regulation.

56. The effect of such a measure would be to allow Member States to adopt specific rules, in limited sectors, which must fully respect this regulation and cannot contradict its purpose (since they must remain "*within the limits of this Regulation*" - see above). These national rules cannot derogate from the draft regulation.[35]

57. In this context, it is to be noted that the employment sector is currently the only one in the proposed regulation, where the Member States are allowed to adopt "*specific rules regulating the processing of personal data*".

58. As regards Article 81 of the proposed regulation, this provision states that the basis for processing data concerning health must be laid down either in Union or in Member States' law, and that such a law shall provide for suitable safeguards and shall justify the processing of these data with specific reasons. Although this provision does not allow Member States to adopt "*specific rules on processing*", as in Article 82, it nevertheless leaves some room for national rules, which must fully respect the conditions laid down in this Article and the draft regulation as a whole.

59. If the scope of above-mentioned rules were to be extended, such measures would have to remain within the "*specific data protection situations*", as the title of Chapter IX suggests and the reasons for this extension would have to be stated. Such provisions should indeed remain clearly limited to certain specified sectors, where such specific national rules are deemed to be necessary and justified. Such rules should also be consistent with the purpose of the act as a whole.

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35 See recital 124 of the proposed regulation.

(g) On the possibility to insert a provision on more stringent national rules

60. The suggested amendment on more stringent national rules for data processing by public authorities reads as follows:

"*(1) This Regulation shall not prevent Member States from maintaining any national rules for data processing by public authorities aimed at ensuring more extensive protection of personal data than those contained in this Regulation, provided they are in force at the time of the entry into force of this Regulation. Each Member State shall inform the Commission about such national rules twelve months after the date specified in Art. 90(1) at the latest. The Commission shall bring them to the attention of the other Member States.*

(2) Member States may adopt national rules aimed at ensuring more extensive protection of personal data than those contained in this Regulation for data processing by public authorities. Each Member State shall inform the Commission about such national rules, within one year after their adoption at the latest. The Commission shall bring them to the attention of the other Member States." (both paragraphs together are hereinafter referred to as "the suggested amendment").

61. As explained above, it is not generally excluded to provide exemptions and/or derogations from a regulation in the text of the regulation itself, if the freedom thus granted to the Member States is clearly limited and does not contradict the Treaties, or the purpose of the legislative act as a whole. As further set out above, in principle, this also means that provisions of Union legislation permitting the adoption of more stringent rules in the national law, even in a regulation, cannot be considered as being *per se* incompatible with the Treaties.[36]

62. In the present case, Article 16(2) TFEU, on which, in particular, the proposed regulation is based, refers to two objectives, i.e. the protection of personal data and the free movement of such data.[37] It seems therefore that a provision allowing the Member States to adopt national rules aimed at ensuring more extensive protection of personal data, which develop the first of the two objectives of Article 16 (2) TFEU, would not be, *per se*, contrary to it, as long

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36 See, for an example of a regulation which provides for more stringent Member State measures, Article 6 of Regulation (EC) No 300/2008 of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002 (OJ L 97, 9.4.2008, p. 72):
"*More stringent measures applied by Member States*
1. Member States may apply more stringent measures than the common basic standards referred to in Article 4. In doing so, they shall act on the basis of a risk assessment and in compliance with Community law. Those measures shall be relevant, objective, non discriminatory and proportional to the risk that is being addressed.
2. Member States shall inform the Commission of such measures as soon as possible after their application. Upon reception of such information, the Commission shall transmit this information to the other Member States.
3. Member States are not required to inform the Commission where the measures concerned are limited to a given flight on a specific date."

37 The other legal basis for the proposed regulation, Article 114(1) TFEU, does not contradict this analysis. See, for its limited role in this proposal, footnote 10 of this legal opinion.

as these rules do not have the intended or practical effect of hampering its second objective, that is the free flow of personal data within the Union.

63. That said, it must be noted that the concrete terms of the suggested amendment are very broad, encompassing the entire scope of application of the draft regulation, even if they are limited to processing data by public authorities, and to the rules ensuring a "*more extensive protection*". Contrary to the amendments examined in the previous subsections of this legal opinion, this one allows the Member States to derogate from any or all provisions of the draft regulation, to the extent that such derogation is by means of a rule more protective of personal data than the provision(s) derogated from.

64. Since the terms of the suggested amendment moreover grant the Member States a very broad discretion to maintain or adopt derogatory national rules, this could potentially lead to more differentiation of the national legislations in the field of the protection of personal data.

65. Therefore, such a broad and a general derogation might not be consistent and even contradict the purpose of the draft regulation, and in particular its parallel objective to ensure free movement of personal data, as laid down in its Article 1, and foreseen in Article 16(2) TFEU.

66. This risk is higher for the second paragraph of the suggested amendment, than it is for the first, since the second paragraph would allow Member States to adopt new derogatory national rules for an unlimited period of time, which could undermine the free movement of personal data more than the first paragraph of the suggested amendment.

67. Concerning the limitation to the public authorities, it has to be recalled that the draft regulation, as it stands now, does not differentiate between public or private entities as regards the processing of personal data, nor does it define these terms. Therefore, the suggested amendment lacks clarity as regards its precise scope.

68. Furthermore, the suggested amendment could lead to more legal uncertainty, since individuals as well as controllers and processors would be uncertain as to which law - Union or national - should apply in a particular case.

69. Moreover, it must be noted that, since Directive 95/46/EC has led to a, in principle, complete[38] harmonisation of national laws in the area of the protection of personal data, the introduction of the suggested amendment could affect the degree of the harmonisation hitherto achieved.

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38 See the previous analysis in this legal opinion (paragraph 11, footnote 12) and Case C-101/01 *Lindqvist* as cited above, paragraph 96.

70. For this reason, should the suggested amendment be introduced, a regulation - which is the Union instrument used to achieve the highest degree of harmonisation - might not be, anymore, the most appropriate choice for this proposal. Therefore, a directive, which under Article 288(3) TFEU grants Member States the choice of form and methods of implementation, might seem to be a more suitable instrument.

71. Thus, if the suggested amendment or any similar provision were to be introduced in the draft regulation, a number of questions would have to be clarified:

- such a provision would have to be in compliance with the Treaty and in particular, it must not allow Member States to undermine the aim of free movement of data (Article 16(2) TFEU) and the prohibition of discrimination on grounds of nationality (Article 18 TFEU) ;

- this possibility should be limited with regard to other, competing fundamental rights, which should not be disproportionately interfered with, nor be stripped of their essence (Article 52(1) and (3) of the Charter);

- such a provision would have to be drafted with particular regard to the principle of proportionality (Article 5(4) TEU). This might require a more restrictive approach to the possibility of adopting more stringent national rules in the future, as opposed to the mere maintenance of existing more stringent national rules.

- the principle of legal certainty[39] would call, for example, for clear limits, both in terms of scope and substance, on the possibility for Member States to adopt more stringent rules, as well as provisions on publication and information on any such national rules.

- such a provision would have to be consistent with the purpose of the regulation as a whole.[40] Here, in particular, the current recitals would have to be modified, since the draft regulation, as it now stands, seeks to achieve an equivalent data protection standard throughout the Union.[41] The need for these derogations would have to be justified by the appropriate recitals.

- finally, the choice of the legal instrument (a regulation) might have to be reconsidered.

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39 See Judgment of 10 May 2012 in joined Cases C-338 to 347/11 *Santander Asset Management* as cited above, paragraph 59.

40 Case C-414/02 *Spedition Ulutrans* [2004] ECR I-8633, paragraph 38.

41 See current recital 8 of the proposed regulation.

72. In conclusion, even if, in principle, the legislature can provide, in the proposed regulation, for a provision allowing Member States to adopt more stringent rules on protection of personal data by national law, this derogation must be in compliance with the Treaties and cannot be inconsistent with the aim of the proposed regulation. In particular, such a provision must clearly specify the scope of the derogation and ensure that more stringent national rules would not undermine other fundamental rights or the free movement of personal data. As it is now drafted, the suggested amendment can be source of legal uncertainty and does not meet the above-mentioned conditions.

(h) Closing remarks

73. All the above-mentioned amendments, as included in the request for this legal opinion, can be perceived as reflecting a concern that the draft regulation risks a reduction in the level of personal data protection in some Member States.[42]

74. In any event, the desired effect of ensuring that the draft regulation will not lessen the protection granted in the Member States can be achieved by striving to ensure the highest possible level of protection in the proposed act. Additionally, it could be possible for the legislature to reintroduce in the preamble of the draft regulation a recital similar to the one included in recital 10 of Directive 95/46/EC, which reads: "*whereas* [...] *the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community*".

75. Finally, it is important to bear in mind that the draft regulation, when adopted, will have to be applied and interpreted in the light of the fundamental rights and principles recognised in the Charter.[43]

76. This conclusion is also in line with the jurisprudence of the Court, which held, in relation to Directive 95/46/EC, that:

> "*the provisions of Directive 95/46, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which, according to settled case-law, form an integral part of the general principles of law whose observance the Court ensures*" and that "*Directive 95/46 itself, while having as its principal aim to ensure the free movement of personal data, provides in Article 1(1) that Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data*".[44]

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42 The Legal Service notes that the EDPS, in his opinion on the data protection reform package as cited above, gives an overall positive opinion about the draft regulation, considering it a "*huge step forward for data protection in the EU*" (paragraph 41).

43 See recital 139 of the draft regulation.

44 Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof* v *Österreichischer Rundfunk* [2003] ECR I-4989, paragraphs 68 and 70.

III.B. Questions on delegated and implementing acts

77. Pursuant to Article 290(1) TFEU, and according to settled case-law of the Court,[45] only the power to amend or supplement non-essential elements of a legislative act can be delegated to the Commission, whilst essential elements must always be reserved for the legislative act itself to be adopted by the legislature and may not be delegated.

78. In order to follow a useful and logical reasoning on the problems raised, the Legal Service firstly examines the question on the essential elements and subsequently the question on the non-essential elements.

(a) On the question of essential elements of the proposed regulation

79. Although the Court has not yet interpreted the notion of "*essential elements*" within the meaning of Article 290 TFEU, as introduced by the Lisbon Treaty, lessons can nonetheless be drawn from the case-law relating to implementing measures before the entry into force of the Lisbon Treaty, which defined the essential elements of a legislative act as rules "*which are intended to give concrete shape to the fundamental guidelines of Community policy.*"[46]

80. In its recent judgment of 5 September 2012, the Court added some further, but not exhaustive, clarifications on the concept of "*essential elements*"[47] by ruling that essential are "*provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature*". According to the Court "[a]*scertaining which elements of a matter must be categorised as essential is not (...) for the assessment of the European Union legislature alone, but must be based on objective factors amenable to judicial review. In that connection, it is necessary to take account of the characteristics and particularities of the domain concerned.*"[48]

81. In this case, brought by the European Parliament, the Court annulled Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code[49], since it found that the contested decision contained essential elements of the surveillance of the sea external borders of the Member States, which go beyond the scope of the additional measures within the meaning of Article 12(5)

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45 Judgment of 5 September 2012 in Case C-355/10 *Parliament* v *Council*, paragraph 64 and the abundant case-law cited therein.

46 Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraph 37.

47 The case in question concerned an implementing measure adopted by the Council according to the regulatory procedure with scrutiny on the basis of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), as amended by Council Decision 2006/512/EC of 17 July 2006 (OJ 2006 L 200, p. 11). However, the terminology used by Council Decision 1999/468/EC is similar to the one employed by Article 290 TFEU on delegated acts.

48 Case C-355/10 *Parliament* v *Council* as cited above, paragraphs 65, 67 and 68.

49 Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111, 4.5.2010, p. 20.

of the Schengen Borders Code[50] and only the Union legislature was entitled to adopt such a decision.

82. In this judgment, the Court held, in particular, that the contested decision not only constituted a major development on the Schengen Borders Code system, but also contained provisions which could interfere with the fundamental rights of the persons apprehended at sea. Therefore, in the view of the Court, the adoption of such provisions required political choices to be made, which could be only done by the Union legislature.

83. As regards the draft regulation, the Commission proposed a great number of delegated acts, which mainly aim to "*further specify the criteria and requirements*" of more general measures. The general provision on the exercise of the delegation is Article 86 of the proposed regulation.

84. The question of determining whether some of these delegated acts might potentially touch upon essential elements of the draft regulation, that is to say that they "*require political choices falling within the responsibilities of the European Union legislature*", needs to be answered on a case-by-case basis. However, the answer is not always straightforward on the basis of a delegating provision only, as it also depends on the content of the future delegated act.

85. In this case, among the proposed delegated acts, none of the delegating provisions is likely to affect the essential elements of the draft regulation in such a clear and striking way that its illegality can be noticed from the outset.

86. However, some provisions on delegated acts are drafted imprecisely, granting a very broad scope of delegating powers to the Commission, which allows it to be argued that some essential elements of the draft regulation could be affected by any future delegated acts adopted on their basis. These provisions include, in particular, Article 6(5), Article 9(3), Article 17(9), Article 20(5), Article 31(5), Article 32(5), Article 34(8), Article 44(7), Article 81(3) and Article 82(3) and Article 83(3).

87. Apart from the essential elements of the draft regulation which must be regulated therein, in the case of all other non-essential elements, the legislature has a choice of either delegating them to the Commission or regulating them directly in the draft regulation. This choice is of a political, and not a legal nature.

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50 Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13.4.2006, p. 1.

(b) On the question of elements supplementing or amending the proposed regulation

88. According to Article 290(1) TFEU, delegated acts are designed to "*supplement or amend certain non-essential elements of the legislative act*".

89. Without prejudice to the above analysis concerning the imprecision of some provisions of delegated acts, which could potentially affect the essential elements of the draft regulation and therefore should rather be included in the basic act, all other delegated acts as foreseen in the draft regulation aim to *supplement* (in other words, to add to) its non-essential elements. No act, foreseen as a delegated act in the draft regulation, has been identified as aiming to *amend* the non-essential elements of it.

90. In any case and in order to better clarify the issue at stake, the fact that the Commission can propose the adoption of these measures as delegated acts does not prevent the legislature from including them in the draft regulation rather then having recourse to a delegation.

(c) On the question of the normal time taken for a possible expression of objection

91. As regards a period of two months for a possible expression of objection, renewable once, as foreseen in Article 86(5) of the draft regulation, it is not regulated by the Treaties but corresponds to a standard clause indicated in paragraph 10 of the Common Understanding.[51] According to this document, "*without prejudice to the urgency procedure, the period for objection defined on a case-by-case basis in each basic act should in principle be of two months, and not less than that, extendable by two months at the initiative of the European Parliament or the Council*".

92. Due of the non-binding character of the Common Understanding, the period of two months can be adjusted in the basic act, for example, to take into account the complexity of the expected delegated act. Such an extension of a scrutiny period from two to three months has already been used in a number of legislative acts.[52]

93. The assessment of the opportunity to keep or extend the two months objection period is reserved to the legislature.

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51 See annex to the letter of the President of the European Parliament of 30 March 2011 to the President of the Council, as included in Council document no. 8640/11.

52 See, for example, Article 13 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ L 331, 15.12.2010, p. 84.

IV. Conclusions

94. In light of the foregoing, the Legal Service reaches the following conclusions:

(a) It is not generally excluded to provide exemptions and/or derogations from a regulation in the text of the regulation itself, including a power for Member States to apply specific rules derogating from certain of the regulation's provisions, if the freedom thus granted to the Member States is clearly limited and does not contradict other applicable legal obligations, nor the purpose of the legislative act as a whole.

(b) Article 6(3)(b) of the proposed regulation does not provide a possibility for Member States to adopt rules deviating from those contained in the proposed regulation. Under the proposed regulation, as it stands now, the rules on how to process personal data are a matter reserved for the proposed regulation alone.

(c) Information on national transposition measures for Directive 95/46/EC can be found in the Commission's Impact Assessment accompanying the draft regulation. A further useful source of information in this context is the Commission's First Report on the implementation of Directive 95/46/EC and the technical analysis which accompanies it, as well as the European Parliament's resolution issued thereupon.

(d) The precise meaning and practical effect of the expression "*within the limits of this Regulation*" depends on the concrete context in which it is used throughout the proposed regulation, as specified in this legal opinion for each operative provision where it appears.

(e) A possibility for Member States to provide for more stringent national rules on data protection is not foreseen in the proposed regulation as drafted by the Commission, and in particular "*within the limits of this Regulation*" cannot be read to provide such a possibility.

(f) If any of the amendments on "*specific rules*" referred to in question 4 of the request for this legal opinion were to be introduced in the draft regulation, their scope and meaning would have to be clarified. Moreover, it would have to be ensured that they remain consistent with the purpose of the act as a whole.

(g) The extension of Articles 81 and 82 would be possible only to the extent that they remain clearly limited to certain specified sectors, where specific national rules are deemed to be necessary and justified. The provisions would also have to remain consistent with the purpose of the act as a whole.

(h) Even if, in principle, the legislature can provide, in the proposed regulation, for a provision allowing Member States to adopt more stringent rules on protection of personal data by national law, this derogation must be in compliance with the Treaties and cannot be inconsistent with the aim of the proposed regulation. In particular, such a provision must clearly specify the scope of the derogation and ensure that more stringent national rules would not undermine other fundamental rights or the free movement of personal data. As it is now drafted, the suggested amendment can be a source of legal uncertainty and does not meet the above-mentioned conditions.

(i) Among the proposed delegated acts, none of the delegating provisions is likely to affect the essential elements of the draft regulation in such a clear and striking way that its illegality can be noticed from the outset. However, some provisions on delegated acts, as further specified in this legal opinion, are drafted imprecisely, granting a very broad scope of delegating powers to the Commission, which allows it to be argued that some essential elements of the draft regulation could be affected by any future delegated acts adopted on their basis.

(j) Subject to the above-mentioned problem of the precision of some provisions, the delegated acts foreseen in the draft regulation aim to supplement the legislative act. No provision has been identified as clearly allowing the Commission to amend the draft regulation.[53]

(k) The assessment of the opportunity to keep or extend the two months objection period is reserved to the legislature.

Annex: Request for a legal opinion of 23 July 2012

[53] In the context of the preparation for a shadows' meeting on 7 November 2012, it appeared that Article 79(7) of the proposed regulation could also be seen, according to a slightly different interpretation of the wording of this provision, as an example of an *amending* (and not only supplementing) delegated act. This finding does not have, however, any particular legal effect.

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Committee on Civil Liberties, Justice and Home Affairs
The Chairman

IPOL-COM-LIBE D(2012)39647

Arrivé Service Juridique
le 23 -07- 2012

Mr Christian PENNERA
Jurisconsult
KAD 06 A 007
LUXEMBOURG

Subject: Request for an Opinion of the Legal Service on the proposal for a regulation 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) (COM(2012(0011)

The European Parliament has been referred a legislative proposal of 25 January 2012 for a Regulation 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) (COM(2012(0011). As regards the mentioned proposal I am referring to you on behalf of the Rapporteur Mr. Albrecht the following questions as listed bellow.

I. Question on the relationship between the draft Regulation and national laws

Article 6 of the proposed data protection Regulation deals with grounds of lawful processing. According to Article 6(1)(c) and (d), processing of personal data shall be lawful if and to the extend that such processing is necessary for compliance with a legal obligation to which the controller is subject, or necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. The basis of the processing referred to in points (c) and (e) of paragraph 1 must be provided for in Union law or the law of the Member State to which the controller is subject (Article 6(3)). Such a national law is subject to further conditions as regards the quality of the law. Furthermore, Chapter IX provides for special situations for data processing in which the member states can provide exemptions, derogations and specific rules. As regards the mentioned issues we would request an answer to the following questions:

1) What exactly does Article 6(3)(b) mean for the interaction and coexistence of national law and EU law, particularly with regard to existing national data privacy law in specific (public) sectors?

2) Is the Legal Service aware of any laws in Member States transposing Directive 1995/46/EC or otherwise regulating data protection which would have stronger protections for individuals than the ones contained in the draft regulation? If so, which are specific aspects of stronger protection, and could they be incorporated into the draft Regulation?

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3) What does "within the limits of the regulation" mean, given the fact that data protection is a fundamental right and therefore only should have limits for infringing it, not for protecting it? Does it mean that member states are not allowed to set rules with stronger data protection provisions? What would be necessary to allow member states to set such rules?

4) Would it be possible to insert one of the following amendments to Article 6(3)(b) and what would be the effect of that?

a) "Within the limits of this Regulation, Member States may adopt by law specific rules *regulating the processing of personal data in this context."*

b) "Within the limits of this Regulation, Member States may adopt by law specific rules regulating the processing of personal data by a public authority, agency or body in this context."

5) Would it be possible to extend Article 81 or Article 82 of the proposed Regulation to other sectors, or to introduce a new article in Chapter IX with a general clause allowing more specific laws by member states?

6) Would it be possible to insert the following Article to the proposed Regulation and what would be the effect?

"Article X Stricter national rules for data processing by public authorities

(1) This Regulation shall not prevent Member States from maintaining any national rules for data processing by public authorities aimed at ensuring more extensive protection of personal data than those contained in this Regulation, provided they are in force at the time of the entry into force of this Regulation. Each Member State shall inform the Commission about such national rules twelve months after the date specified in Art. 90(1) at the latest. The Commission shall bring them to the attention of the other Member States.

(2) Member States may adopt national rules aimed at ensuring more extensive protection of personal data than those contained in this Regulation for data processing by public authorities. Each Member State shall inform the Commission about such national rules, within one year after their adoption at the latest. The Commission shall bring them to the attention of the other Member States."

II. Question on delegated and implementing acts

The proposed regulation contains a number of delegated acts. As regards the mentioned issue we would request an answer to the following questions:

1) Can the Legal Service provide an assessment which of these acts would clearly "supplement or amend certain non-essential elements" of the proposed regulation in the meaning of Article 290 TFEU?

2) Can the Legal Service provide an assessment of which of these acts would touch upon "essential elements" of the proposed regulation in the meaning of Article 290 TFEU?

3) Can the Legal Service give its opinion on the period of two months for a possible expression of objection, as foreseen in Article 86(5) of the proposed regulation, especially in view of the normal time taken for such decisions in the Parliament's procedures?

I would like to express my gratitude for the close cooperation and advice so far and look forward to our further collaboration and to have a feed back to this request in the shortest delay.

Yours sincerely,

Juan Fernando LÓPEZ AGUILAR

CC: Mr Jan Philipp Albrecht, Rapporteur for the file