

**FRA**

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

To the attention of:

Mr Martin Schulz
President of the European Parliament
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Dear President Schulz,

Referring to your letter dated 5 September 2012 with reference nr. 314206, I am pleased to submit to you attached to this letter the EU Fundamental Rights Agency's opinion on fundamental rights issues associated with the Commission proposals for 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) and Directive 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 (Data Protection Directive, COM(2012)0010), as you requested pursuant to Article 4, paragraph 1, point (d) of the Agency's founding regulation.

Yours sincerely

Morten Kjaerum
Director

MOA

Morten Kjaerum, Director

European Union Agency for Fundamental Rights
Agentur der Europäischen Union für Grundrechte | Agence des droits fondamentaux de l'Union Européenne

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FRA Opinion – 2/2012
Data protection reform package

Vienna, 1 October 2012

**Opinion
of the
European Union Agency for Fundamental Rights
on the
proposed data protection reform package**

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),

Bearing in mind the Treaty on the European Union (TEU), in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (hereafter the Charter),

In accordance with Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, in particular Article 2 with the objective of the FRA “to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights”,¹

Having regard to Article 4 (1) (d) of Council Regulation 168/2007, with the task of the FRA to “formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission”,

Having regard also to Recital 13 of Council Regulation 168/2007, according to which “the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned”,

Acknowledging the Opinion of the European Data Protection Supervisor (EDPS) of 7 March 2012,² the Opinion of the Article 29 Data Protection Working Party (A29 WP),³ the Opinion of the European Economic and Social Committee (EESC) of 23 May 2012,⁴ and the draft Opinion of the Committee of the Regions (Commission for Education, Youth, Culture and Research) on the Data Protection Package of 6 July 2012,⁵

In response to the request of 5 September 2012 from the European Parliament for an Opinion on the 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 the

¹ Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L 53/1.

² European Data Protection Supervisor (2012), *Executive summary EDPS Opinion of 7 March 2012 on the data protection reform package*, OJ 2012 C 192/05, Brussels, 7 March 2012, OJ 2012 C 192/7 (hereafter EDPS Opinion). The full text of the EDPS Opinion is available on the EDPS website: www.edps.europa.eu.

³ Article 29 Data Protection Working Party (2012) *Opinion 01/2012 on the data protection reform proposals*, WP 191, Brussels, 23 March 2012 (hereafter A29 WP Opinion).

⁴ European Economic and Social Committee (2012), *Opinion on the ‘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 (COD), Brussels, 23 May 2012, OJ 2012 C 229/90 (hereafter EESC Opinion).

⁵ Committee of the Regions (2012), *Draft Opinion of the Commission for Education, Youth, Culture and Research on the data protection package*, EDUC-V-022, Brussels, 6 July 2012, (hereafter CoR Opinion).

free movement of such data (General Data Protection Regulation – draft Regulation)⁶ and on the Proposal for a Directive of the European Parliament and 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 (draft Directive),⁷

SUBMITS THE FOLLOWING OPINION:

⁶ European Commission (2012), *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, Brussels, 25 January 2012 (hereafter draft Regulation).

⁷ European Commission (2012), *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*, COM(2012) 10 final, Brussels, 25 January 2012 (hereafter draft Directive).

FRA considerations

Horizontal issues

The proposed instruments aim to protect fundamental rights in general and data protection in particular. Both draft proposals set out a list of fundamental rights potentially affected by the data protection reform package. However, the list of fundamental rights affected differs between both instruments. Therefore, consideration could be given to align the lists of fundamental rights affected in both instruments. Otherwise, any discrepancy between the lists of affected fundamental rights should be justified in terms of the specificity of the scope of each instrument, whereby the drafts would be amended accordingly. The list of affected fundamental rights might also be expanded in both instruments.

The data protection reform package could potentially limit a number of fundamental rights that are not specifically mentioned in the proposed instruments. Consideration could be given to insert a specific reference stating that these instruments are applied in a manner consistent with the provisions of the Charter.

Certain delegated and implementing acts could restrict fundamental rights. Consideration could be given to insert an explicit guarantee that both delegated and implementing acts would not limit fundamental rights in a way contrary to the Charter.

In the context of data transfer to third countries, for which there is no adequacy decision, the draft instruments provide for safeguards relating specifically to the protection of personal data but not to the protection of other fundamental rights. Consideration could be given to insert a provision for a strong fundamental rights safeguard concerning sharing of information with third countries.

Freedom of expression and information (Article 11 of the Charter)

The draft Regulation prescribes an exemption related to data processing ‘solely for journalistic purposes’. Consideration could be given to replace the ‘journalistic purposes’ concept with the generic notion of ‘freedom of expression and information’. At the minimum, consideration could be given to enshrine all elements of Recital 121 of the draft Regulation in Article 80 of the draft Regulation (processing of personal data and freedom of expression) which could specifically refer to Article 11 of the Charter.

Freedom of the arts and sciences (Article 13 of the Charter)

In order to duly take into account the Charter’s guarantees, consideration could be given to insert a specific reference to Article 13 of the Charter in relation to Articles 80

(processing of personal data and freedom of expression) and 83 (processing for historical, statistical and scientific research purposes) of the draft Regulation.

Freedom to conduct a business (Article 16 of the Charter)

The new obligations for business enshrined in both instruments will entail new costs for these data controllers. Consideration could be given to refer in both instruments to Article 16 of the Charter to ensure a proper balance between data protection and the freedom to conduct a business.

Rights of the child (Article 24 of the Charter)

The right to be forgotten under Article 17 of the draft Regulation is particularly relevant for the erasure of personal data, which has been made available while the data subject was a child. Consideration could be given to specify that the exercise of this right is also applicable when the child is still considered as a child.

The requirement that data protection impact assessments be carried out prior to processing operations, which are likely to present specific risks to the rights and freedoms of data subjects under Article 33 of the draft Regulation (data protection impact assessment), could specify that this should, as far as possible, be conducted in relation to processing of data concerning children.

Access to documents

In order to duly take into account developments with respect to access to documents both at national and international level, consideration could be given to insert a substantive clause on access to documents in both instruments, as prescribed by national legislation. Such an amendment could facilitate the necessary balancing exercise between data protection and the right of access to documents.

Non-discrimination (Article 21 of the Charter)

Provisions on sensitive data aim to protect privacy and non-discrimination. Consideration could be given to include 'sexual orientation' in the list of sensitive data, as laid down in Article 21 of the Charter, in both the draft Regulation and Directive.

Statistical data to fight discrimination

Statistical data processing of sensitive data can contribute to disclose patterns of discrimination which can be used to devise policies, specific actions and provide expert input to courts. Consideration could be given to insert a specific reference to Article 21

of the Charter in the context of the fight against discrimination through statistical data collection.

Sensitive data and legal capacity

The deprivation of legal capacity is not in full conformity with the international obligations linked to the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD). Consideration could be given to align Article 9 of the draft Regulation with the requirements of Article 12 of the CRPD on equal recognition before the law.

Sensitive data and profiling

In the draft Regulation, measures based on profiling and automated processing are enshrined under the data subject rights chapter, while in the draft Directive they are under the principles. To align both instruments, measures based on profiling and automated processing could be placed under the chapter on the rights of the data subject in each instrument.

Both instruments ban profiling based 'solely' on sensitive data. A wider protection against abuse of sensitive data could be enshrined in both the draft Regulation and Directive, if the proposals would prohibit profiling based 'solely or mainly' on sensitive data.

Access to justice (Article 47 of the Charter)

Legal standing

To further enhance the effectiveness of the right to an effective remedy under Article 47 of the Charter (right to an effective remedy and to a fair trial) covered by the two proposals, consideration could be given to further relax legal standing rules to enable organisations acting in the public interest to lodge a complaint. Such broadening of legal standing rules would envisage relevant safeguards to be put in place to preserve the right balance between effective access to remedies and abusive litigation.

Effective redress mechanism

To empower Data Protection Authorities (DPAs) to award compensation in individual cases, subject to review by the judiciary, could be a way of streamlining the complex redress route for data subjects wishing to pursue their complaint in the area of data protection.

Both instruments provide for a strong basis for the setting-up of independent DPAs. Consideration could be given to enhance the safeguards relating to the nomination of DPA members of the governing body by ensuring pluralism in the nomination process.

Access to justice for children

To facilitate access to justice for children, consideration could be given to provide for child-friendly proceedings, such as adequate legal representation, advice and counselling, as well as free legal aid in both the draft Regulation and Directive. In the draft Directive, specific procedural safeguards could further be envisaged to protect the privacy of child victims.

Introduction

- (1) The FRA welcomes the request of the European Parliament of 5 September 2012 to formulate “an opinion on fundamental rights issues associated” with the European Commission proposals for a draft Regulation and a draft Directive.
- (2) The key objective of the draft Regulation is to strengthen the internal market while ensuring effective protection of the fundamental rights of individuals, in particular their right to data protection.⁸ The key objective of the draft Directive is to guarantee that the processing of personal data needed for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties is done while respecting data protection guarantees. The draft proposal for a Directive further ensures that the exchange of data by competent authorities is not limited by data protection rules.⁹ Through enhanced data protection guarantees, the draft Directive aims to improve mutual trust between police and judicial authorities within and between European Union (EU) Member States.¹⁰ For the first time since the Charter became legally binding with the entry into force of the Lisbon Treaty in December 2009, the EU proposes legislation to effectively and comprehensively guarantee a fundamental right, namely the fundamental right to data protection.
- (3) This FRA Opinion builds in particular on opinions published by the EDPS and the A29 WP which focus on data protection. It complements these opinions by examining other relevant Charter rights. It focuses mainly on fundamental rights other than data protection, since the abovementioned opinions have thoroughly addressed this fundamental right in their opinions. The FRA Opinion looks at the draft Regulation and the draft Directive as part of one single data protection reform package, highlighting the specificities of each proposal only when necessary. When covering both instruments in the following analysis, this Opinion refers to the ‘reform package’.
- (4) Following some general remarks on horizontal fundamental rights issues concerning the data protection reform package in the light of the Charter and the relevant Council of Europe standards,¹¹ the Opinion addresses the need to balance the fundamental right to the protection of personal data with other fundamental rights.

⁸ Article 1 of the draft Regulation. See European Commission (2012), *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*, COM(2012) 9 final, Brussels, 25 January 2012 (hereafter Commission Communication 2012), p. 9 and 12. Note also the aim of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 108, 28 January 1981 (hereafter Convention 108) to promote the free flow of information between people, regardless of frontiers, while ensuring an adequate data protection.

⁹ Article 1 of the draft Directive.

¹⁰ See draft Directive, explanatory memorandum, p. 5; see also Recital 7 of the draft Directive.

¹¹ This concept covers: 1) Convention 108, 2) ECtHR case law based on the ECHR, and 3) Committee of Ministers Recommendations, such as Council of Europe Committee of Ministers Recommendation R(87)15 on regulating the use of personal data in the police sector adopted on 17 September 1987. The work related to the modernisation of Convention 108 is also referred to.

It then analyses the issue of the protection of certain categories of personal data in relation to non-discrimination. Finally, the Opinion examines the safeguards put in place by the reform package to ensure access to justice for individuals in the area of data protection in practice.

1. General remarks on horizontal fundamental rights issues concerning the reform package

1.1. The fundamental rights affected by the Regulation and the Directive

- (5) According to the explanatory memorandum to the draft Regulation, the proposed instrument could potentially affect the following fundamental rights: freedom of expression, freedom to conduct a business, the right to property and in particular the protection of intellectual property, non-discrimination, the rights of the child, healthcare, access to documents, and the right to an effective remedy and to fair trial.¹² The explanatory memorandum to the draft Directive suggests a shorter list of fundamental rights that could potentially be affected by this instrument, namely the prohibition of any discrimination, the rights of the child, and the rights to an effective remedy and to fair trial.¹³ No explanation is provided as to why such a discrepancy between the two proposed instruments would be justified.
- (6) While recognising a difference in scope of the two instruments, it seems that personal data processed by law enforcement and judicial authorities could affect other fundamental rights than the three mentioned in the explanatory memorandum to the draft Directive.¹⁴ For example, while the draft Directive refers to 'data concerning health' in the context of sensitive data,¹⁵ no reference is made to Article 35 of the Charter on healthcare. Similarly, processing of personal data in the scope of the draft Directive might affect the freedom of expression and information of the individual concerned. The European Court of Human Rights (ECtHR) case law provides several examples of seizure of material and surveillance measures directed at media professionals for example.¹⁶ The draft Directive, however, does not

¹² See draft Regulation, p. 7.

¹³ See draft Directive, p. 6.

¹⁴ See EDPS Opinion, para. 305.

¹⁵ See Recital 17, Article 3 (12) and Article 8 of the draft Directive.

¹⁶ See for a recent example: ECtHR, *Ressiot and Others v. France*, Nos. 15054/07 and 15066/07, of 28 June 2012.

mention the right to freedom of expression and information, as guaranteed by Article 11 of the Charter.

- (7) In its fundamental rights impact assessment,¹⁷ the European Commission does not differentiate between the two instruments.
- (8) Several cross-references between the two instruments exist, but these do not necessarily relate to fundamental rights. While the draft Directive, for example, refers to the 'general rules' enshrined in the draft Regulation,¹⁸ the draft Directive does not suggest that these general rules and in particular those protecting fundamental rights are guaranteed under the draft Directive.
- (9) Consideration could be given to align and possibly expand the list of affected fundamental rights in both instruments and amend the drafts accordingly. Otherwise, any discrepancy between the lists of affected fundamental rights should be justified. Furthermore, the relation between the reform package and other EU sectorial legislation,¹⁹ which are not necessarily linked to police and judicial cooperation,²⁰ should be clarified.

1.2. A general fundamental rights clause?

- (10) Both the draft Regulation and the draft Directive aim to protect fundamental rights in general and data protection in particular. Both instruments underline that, while enhancing data protection guarantees, a selected number of fundamental rights enshrined in the Charter are affected by the proposed reform (see Section 1, para. 5).²¹ In practice, however, a large number of other fundamental rights guaranteed by the Charter, which are not mentioned in the proposals, could be affected in specific situations by this wide-reaching reform package.
- (11) The draft Regulation as well as the draft Directive could relate, for example, to Articles 18 and 19 of the Charter which guarantee the right to asylum and ensure protection in the event of removal, expulsion or extradition. However, the possible impact of sharing personal information concerning asylum applicants with alleged persecutors, which can cause a risk of grave human rights violation against the applicant and/or members of the family, is not addressed in either of the two instruments. It is assumed that this is because the European Commission plans to

¹⁷ See European Commission (2012), *Commission Staff Working Paper, Impact Assessment*, SEC(2012) 72 final, Brussels, 25 January 2012 (hereafter Commission Impact Assessment), Annex 7.

¹⁸ Recital 9 of the draft Directive.

¹⁹ See for example in the area of asylum: Article 22 and 41 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status of 1 December 2005.

²⁰ On the related acts in the area of police and judicial cooperation in criminal matters, see EDPS Opinion, para. 312 f.

²¹ See Recital 2 and Article 1 (2) of the draft Regulation and Recital 2 and Article 1 (2) (a) of the draft Directive.

assess the impact of the reform package on other sectorial instruments at a later stage.²²

- (12) The reform package could address this issue in a consistent and general manner, which would complement the reference to the general fundamental rights protection in both instruments. Consideration could be given to insert a specific reference stating that these instruments are applied consistent with the Charter.
- (13) Such reference could possibly be inserted in the first Article of both instruments. It would clarify the way limitations²³ and exemptions²⁴ are organised in both instruments.²⁵

1.3. Delegated and implementing acts

- (14) The draft Regulation provides for the exercise of delegation and implementing power of the European Commission.²⁶ The draft Directive provides for the exercise of delegation as well.²⁷ According to the reform package,²⁸ delegated acts aim to fulfil the objectives of both instruments, namely the protection of fundamental rights, and ensure uniform conditions for the implementation of the Regulation. They will allow further alignment of the Regulation in view of technological developments.
- (15) Although delegated acts should not affect essential elements of the Regulation, they may restrict fundamental rights.²⁹ The same applies to implementing acts: these generally cover technical and administrative issues to set out uniform conditions for the implementation of the Regulation,³⁰ but may restrict fundamental rights.
- (16) The European Commission has committed itself to ensure that implementing and delegated acts are fully in line with the Charter.³¹ An explicit guarantee that delegated and implementing acts cannot limit fundamental rights in any manner contrary to Article 52 of the Charter, setting out the scope and limits of the Charter

²² See European Commission (2010), *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – A comprehensive approach on personal data protection in the European Union*, COM(2010) 609 final, Brussels, 4 November 2010, p. 14, 15 and 18 and Commission Communication 2012, p. 4, footnote 14.

²³ See Article 6 (3) or Article 21 of the draft Regulation. See also the limitations of the rights of the data subject (Chapter III of the draft Directive).

²⁴ Articles 80 f. of the draft Regulation.

²⁵ See on the draft Directive: EDPS Opinion, para. 370 and A29 WP Opinion, p. 28. See on the draft Regulation: EESC Opinion, paras. 3.9, 4.25, see also CoR Opinion, paras. 11 and 21.

²⁶ Articles 86 and 87 of the draft Regulation.

²⁷ Article 56 of the draft Directive.

²⁸ See Recitals 129 and 130 of the draft Regulation and Recital 66 of the draft Directive.

²⁹ Article 290 of the TFEU. See for example Article 20 (5) of the draft Regulation and Articles 81 (3) and 83 (3) of the draft Regulation. See also EDPS Opinion, paras. 48, 71-76, 194 and 304, A29 WP Opinion, p. 6 f. and EESC Opinion, para. 3.11, CoR Opinion, paras. 23 and 27.

³⁰ See Article 291 of the TFEU. See also EDPS Opinion, paras. 71 f. and 248 f.

³¹ See European Commission (2010), *Communication from the Commission – Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final, Brussels, 19 October 2010, para. 1.1.

rights, might be useful as a general safeguard. Consideration could be given to insert such an explicit guarantee.

1.4. Transfer of data to third countries

- (17) Both instruments contain provisions relating to the sharing of personal data with third countries.³² A mechanism is envisaged to facilitate transfer with countries which, following an examination by the European Commission, provide an adequate level of protection.³³
- (18) Both instruments, however, also allow for the transfer of data with countries other than those for which the European Commission has issued a positive adequacy decision. Transfer of personal data to these countries is subject to certain safeguards. In the draft instruments, these safeguards relate only to the protection of personal data by the third country³⁴ and not to the protection of other fundamental rights.
- (19) This is particularly relevant where data is transferred within the scope of the draft Directive.³⁵ Situations may arise in which law enforcement authorities in a third country may use personal data received from an EU Member State (e.g. on a suspected criminal offender) to ill-treat family members of a person, for example. When, based on past human rights records, there is a risk that a third country may use personal data to violate basic human rights, no transfer of data should be allowed.
- (20) In another context, the draft Eurosur Regulation³⁶ provides for a strong safeguard concerning sharing of information with third countries.³⁷ The approach taken in the draft Eurosur Regulation could be adapted to the scope of the reform package in relation to data transferred according to Articles 42 and 44 of the draft Regulation, and Articles 35 and 36 of the draft Directive.

1.5. Considerations

- (21) The proposed instruments aim to protect fundamental rights in general and data protection in particular. Both draft proposals set out a list of fundamental rights

³² See Chapter V of the draft Regulation and the draft Directive respectively.

³³ See Article 41 of the draft Regulation and Article 34 of the draft Directive.

³⁴ Article 42 of the Regulation and Article 35 of the Directive.

³⁵ Article 33 of the draft Directive. See also EDPS Opinion, para. 409 f.

³⁶ European Commission (2011), *Proposal for a regulation of the European Parliament and the Council establishing the European Border Surveillance System (Eurosur)*, COM(2011) 873 final, Brussels, 12 December 2012 (hereafter draft Eurosur Regulation).

³⁷ See Article 18 (2) of the draft Eurosur Regulation, which states: "Any exchange of information [with a third country...] that could use this information to identify persons or groups of persons who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights, shall be prohibited."

potentially affected by the data protection reform package. However, the list of fundamental rights affected differs between both instruments. Therefore, consideration could be given to align the lists of fundamental rights affected in both instruments. Otherwise, any discrepancy between the lists of affected fundamental rights should be justified in terms of the specificity of the scope of each instrument, whereby the drafts would be amended accordingly. The list of affected fundamental rights might also be expanded in both instruments.

- (22) The data protection reform package could potentially limit a number of fundamental rights that are not specifically mentioned in the proposed instruments. Consideration could be given to insert a specific reference stating that these instruments are applied in a manner consistent with the provisions of the Charter.
- (23) Certain delegated and implementing acts could restrict fundamental rights. Consideration could be given to insert an explicit guarantee that both delegated and implementing acts would not limit fundamental rights in a way contrary to the Charter.
- (24) In the context of data transfer to third countries, for which there is no adequacy decision, the draft instruments provide for safeguards relating specifically to the protection of personal data but not to the protection of other fundamental rights. Consideration could be given to insert a provision for a strong fundamental rights safeguard concerning sharing of information with third countries.

2. Balancing fundamental rights

- (25) Article 8 of the Charter enshrines a specific fundamental right to the protection of personal data. Article 8 represents an important element of the right to privacy as guaranteed by Article 7 of the Charter on the respect for private and family life, to which Article 8 is closely connected. Article 8 of the Charter is not an absolute right: the limitations prescribed by Article 52 (1) of the Charter apply.³⁸ Article 52 serves as a general limitation clause to the rights and freedoms guaranteed by the Charter.
- (26) In the European Convention of Human Rights (ECHR) system, data protection is guaranteed by Article 8 of the ECHR (right to respect for private and family life) and, as in the Charter system, this right needs to be applied while respecting the scope of other competing rights. For this reason, both the ECtHR and the Court of Justice of the European Union (CJEU) have recognised that a balancing exercise with other rights is necessary when applying Article 8 of the Charter and Article 8 of the ECHR (see Section 2.1., paras. 30-33).
- (27) One of the key objectives of the data protection reform is to “increase the effectiveness of the fundamental right to data protection”.³⁹ This section analyses

³⁸ See CJEU, joined cases C-92/09 and C-93/09, *Schecke and Eifert v. Land Hessen*, 9 November 2010, paras. 47, 48 and 50.

³⁹ Commission Impact Assessment, p. 40. See also Article 1 of the draft Regulation and Article 1 of the draft Directive.

whether the draft Regulation and the draft Directive recognise the need to balance this right with other rights and freedoms recognised by the Charter. In other words, whether other specific Charter rights are fully taken into account when defining the scope of the enhanced protection of personal data.⁴⁰

- (28) The following sections analyse the right to protection of personal data in relation to the right to freedom of expression and information (Article 11 of the Charter), freedom of the arts and sciences (Article 13 of the Charter), freedom to conduct a business (Article 16 of the Charter) and the rights of the child (Article 24 of the Charter). The section then looks at data protection in relation to the right of access to documents, which is only guaranteed by the Charter in a limited way but which both proposals consider important to uphold.

2.1. Freedom of expression and information

- (29) A number of cases decided by the ECtHR consider the interaction between freedom of expression and data protection guarantees. Complaints related to the publication of personal data, such as photographs⁴¹ or video footage,⁴² by the media have triggered findings of violation of Article 8 of the ECHR or violation of Article 10 of the ECHR (freedom of expression). In each of these cases, the Court had to weigh the interests at stake.
- (30) In the *Mosley* case, the applicant's sexual activities were published in a newspaper and on its website. Mr Mosley wished to enforce a duty for newspapers to notify subjects of future publications prior to publication. The ECtHR considered that Article 8 of the ECHR did not require a legally binding pre-notification requirement, by which media should notify a person prior to publishing material relating to his/her private life. To reach its conclusion, the ECtHR stated: "the protection of Article 10 [...] may cede to the requirements of Article 8 where the information at stake is of a private and intimate nature and there is no public interest in its dissemination."⁴³ In this case, however, having regard to the "chilling effect"⁴⁴ to which a pre-notification requirement risks giving rise, to the significant doubts as to the effectiveness of any such requirement and to the wide margin of appreciation in this area, the ECtHR concluded that Article 8 did not require a legally binding pre-notification requirement. In 2012, two ECtHR judgements clarified further how the

⁴⁰ Recital 139 of the draft Regulation acknowledges the need to balance the protection of personal data with other fundamental rights. Recital 80 of the draft Directive does not refer to such need; instead, it confirms that the proposal is aimed at the protection of "the right to the protection of personal data, the right to an effective remedy and to a fair trial".

⁴¹ See for example: ECtHR, *Von Hannover v. Germany*, No. 59320/00, 24 June 2004. ECtHR, *Sciaccia v. Italy*, No. 50774/99, 11 May 2005 or ECtHR or *Von Hannover v. Germany (No.2)*, Nos. 40660/08 and 60641/08, 7 February 2012.

⁴² See for example: ECtHR, *Peck v. United Kingdom*, No. 44647/98, 28.01.1993 or ECtHR, *Mosley v. United Kingdom*, No. 48009/08, 10 May 2011.

⁴³ ECtHR, *Mosley v. the United Kingdom*, No. 48009/08, 10 May 2011, para. 131.

⁴⁴ ECtHR, *Mosley v. the United Kingdom*, para. 126.

balancing exercise between privacy and freedom of expression should be performed.

- (31) The ECtHR has summarised the criteria that are taken into consideration when balancing the right to freedom of expression and the right to respect for private life in two landmark judgements.⁴⁵ Both cases look at the competing of rights. In the first case, a publishing company lodged a complaint under Article 10 and, in the second case, a well-known public figure under Article 8. In the *Axel Springer AG* case, the Court had to assess whether the publication ban imposed by a court on the owner of the *Bild Zeitung* was compatible with Article 10 of the ECHR. The applicant wanted to publish an article on the arrest and conviction of a well-known actor. The ECtHR concluded that the interference in the applicant's freedom of expression was in violation of Article 10 of the ECHR. In the *Von Hannover (No 2)* case, the applicants complained that in refusing a publication ban on pictures the German courts had not properly protected their private lives. The ECtHR disagreed with the applicants and concluded that Article 8 of the ECHR had not been violated. To reach these conclusions, the Court applied several criteria in both cases relevant to the facts of each case. One of these criteria, used in both cases, refers to the "contribution to a debate of general interest" of the impugned expression.⁴⁶
- (32) In the *Lindqvist* case, the CJEU established that the requirements of the 1995 Directive 95/46/EC (Directive 95/46/EC)⁴⁷ on data protection did not *per se* conflict with the right of freedom of expression enshrined, in particular, in Article 10 of the ECHR. According to the CJEU, national authorities and courts applying data protection guarantees need "to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order."⁴⁸ This approach was confirmed in the *Satamedia* case when the Court was called to interpret Article 9 of Directive 95/46/EC. It acknowledged that: "the object of Article 9 is to reconcile two fundamental rights: the protection of privacy and freedom of expression."⁴⁹
- (33) Both ECtHR and CJEU recognise the need to perform a balancing of rights between freedom of expression and data protection. The ECtHR further suggests a series of criteria to resolve potential tensions between these two fundamental rights and to assess in particular whether the expression did contribute to a debate of general interest (see para. 31 above).
- (34) Directive 95/46/EC enshrines strong freedom of expression guarantees, and the impact assessment prepared by the Commission acknowledges the need to clarify the relations between freedom of expression and data protection.⁵⁰ Article 80 of the

⁴⁵ ECtHR, *Von Hannover v. Germany (No 2)*, Nos. 40660/08 and 60641/08, 7 February 2012, para. 108 f. and ECtHR, *Axel Springer AG v. Germany*, No. 39954/08, 7 February 2012, para. 89 f.

⁴⁶ ECtHR, *Von Hannover v. Germany (No 2)*, para. 109.

⁴⁷ Directive 95/46/EC 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 1995 L 281 (Directive 95/46/EC).

⁴⁸ CJEU, C-101/01, *Bodil Lindqvist*, 6 November 2003, para. 90.

⁴⁹ CJEU, C-73/07, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, 16 December 2008, para. 54.

⁵⁰ Commission Impact Assessment, Annex 2, p. 23.

draft Regulation reiterates with minor changes Article 9 of Directive 95/46/EC.⁵¹ Pursuant to Article 80, EU Member States will have to adopt exemptions and derogations to ensure a proper balance between freedom of expression and data protection.

- (35) The required clarifications called for by the European Commission in its impact assessment are explicitly included in Recital 121 of the draft Regulation. This Recital takes into consideration the relevant CJEU case law (see para. 32 above). It also recognises the importance of freedom of expression by referring to Article 11 of the Charter. It provides interpretative guidance on the notion of 'journalistic purposes' which includes any activities disclosing to the public information, opinions or ideas irrespective of the medium used.
- (36) One possible approach to further clarify the relations between freedom of expression and data protection could be to insert all elements of Recital 121 into Article 80 of the draft Regulation.
- (37) By generally keeping the text of Article 9 of Directive 95/46/EC, the draft Regulation risks to inadequately cover all types of expression that could contribute to a debate of public interest. Accordingly, consideration could be given as to whether the reference to 'journalistic purposes' in Article 80 of the draft Regulation is appropriate or whether the generic term of 'freedom of expression and information' may be the preferable reference to insert in the draft Article.⁵²
- (38) Indeed, the Council of Europe Committee of Ministers Recommendation on a new notion of media shows how important it is nowadays to widen the concept of media.⁵³ Similarly, as recognised by the CJEU, the concept of 'journalistic purpose' should not be interpreted too narrowly.
- (39) A reference to freedom of expression and information as guaranteed by Article 11 of the Charter in Article 80 of the Regulation would provide the necessary flexibility to EU Member States and national courts to organise the balance between data protection and freedom of expression, according to their national legislation in line with Article 52 (1) of the Charter. EU Member State law would have to provide for limitations to data protection in a proportionate way and only if it is necessary to reconcile the right to freedom of expression and the right to data protection.⁵⁴ At the same time, this would not *a priori* exclude certain types of expression or persons such as, for example, whistleblowers, whose expression is protected by freedom of expression and information guarantees.⁵⁵

⁵¹ The draft Directive does not mention freedom of expression.

⁵² The drafters of the modernised Convention 108 seem to have taken this approach: see Council of Europe (2012), *Consultative Committee of the convention for the protection of individuals with regard to automatic processing of personal data, Modernisation of Convention 108: new proposals*, T-PD(2012)04Rev_en, Strasbourg, 17 September 2012 (hereafter Consultative Committee on Modernisation of the Convention 108), p. 12.

⁵³ Council of Europe, Committee of Ministers (2011), Recommendation Rec(2011)7 to member states on a new notion of media, 21 September 2011.

⁵⁴ See EDPS Opinion, para. 283-289.

⁵⁵ See ECtHR, *Guja v. Moldova*, No. 14277/04, 12 February 2008.

- (40) Pursuant to the draft Regulation,⁵⁶ a data controller should not erase personal data that are necessary in the exercise of freedom of expression and information.⁵⁷ Amending Article 80 of the draft Regulation, as suggested above, would also be valuable in relation to the implementation of Article 17 of the draft Regulation on the right to be forgotten and to erasure of personal data.

2.2. Freedom of the arts and sciences

- (41) Article 13 of the Charter guarantees freedom of the arts and sciences. Freedom of the arts and sciences is not absolute and should be balanced with data protection rights since personal data could be used by artists, for example. The CJEU has yet to deliver a judgement based on Article 13 of the Charter. In the ECHR system, Article 10 guarantees freedom of artistic expression⁵⁸ and literary creation.⁵⁹ According to the ECtHR: “those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression.”⁶⁰
- (42) Article 80 of the draft Regulation calls on EU Member States to establish derogations and exemptions in the context of “artistic and literary expression”. In the ECHR system, these concepts are covered by the general freedom of expression guarantees. Given the legally binding nature of the Charter, it could be advisable to make specific reference to the freedom of the arts and sciences, as guaranteed by Article 13 of the Charter.

2.3. Freedom to conduct a business

- (43) Another Charter right that will frequently require reconciliation with Article 8 of the Charter is the freedom to conduct a business under Article 16 of the Charter.⁶¹ In particular, the draft Regulation and the draft Directive introduce new obligations on business with the aim of enhancing data protection and the rights of data holders.

⁵⁶ Article 17 (3) (a) of the draft Regulation.

⁵⁷ See also the discussions on the ‘right to be forgotten’, which took place during the 3rd Annual FRA Symposium: FRA (2012), *European Union data protection reform: new fundamental rights guarantees*, 3rd Annual FRA Symposium, Vienna, 10 May 2012 (hereafter FRA Symposium Report), p. 6 f.

⁵⁸ ECtHR, *Müller and Others v. Switzerland*, No. 10737/84, 24 May 1988, para. 33 and ECtHR, *Vereinigung Bildender Künstler v. Austria*, No. 68354/01, 25 January 2007, para. 33; see also ECtHR, *Akdaş v. Turkey*, No. 41056/04, 16 February 2010, para. 24-25. Indeed, expression may be artistic and political at the same time, see ECtHR, *Táatar and Fáber v. Hungary*, Nos. 26005/08 and 26160/08, 12 June 2012, para. 41.

⁵⁹ ECtHR, *Karataş v. Turkey*, No. 23168/94, 8 July 1999, para. 49 and ECtHR, *Alinak v. Turkey*, No. 40287/98, 29 March 2005, para. 41 and ECtHR, *Lindon, Otchakovsky-Laurens and July v. France*, No. 21279/02, 36448/02, 22 October 2007, para. 47.

⁶⁰ ECtHR, *Karataş v. Turkey*, No. 23168/94, 8 July 1999, para. 49.

⁶¹ See also relevant references in: Commission Impact Assessment, Annex 7.

These obligations will have an impact on the extent to which businesses will exercise their freedom under Article 16 of the Charter, in particular by entailing new costs on the part of data controllers.

- (44) These new obligations include mandatory data protection officers in the public and private sector,⁶² the introduction of data protection impact assessments,⁶³ documentation obligations⁶⁴ or obligations linked to the execution of some of the data subject's rights, such as the right of access,⁶⁵ the right to be forgotten⁶⁶ or the right to portability.⁶⁷ It is therefore of utmost importance to ensure, in accordance with Article 52 (1) of the Charter, that such limitations be necessary and proportionate to the desired aim and preserve the essence of the fundamental freedom concerned. In other words, implementation costs resulting from such obligations must not be so high as to disproportionately impair the very essence of the freedom to conduct a business.
- (45) Recent CJEU cases exemplify the need to achieve a balance between the protection of the intellectual property rights of copyright holders and internet service providers' freedom to conduct a business. In the case of *Scarlet Extended SA v. SABAM*,⁶⁸ the main question referred to the CJEU was whether the relevant EU legislation in the field of intellectual property rights should be interpreted as precluding an injunction against an internet service provider (ISP) introducing a system for filtering electronic communications to prevent file sharing that infringes copyright laws. The CJEU had to balance the right to intellectual property (Article 17 (2) of the Charter) of individuals affected by measures introduced by the ISP with the right of the ISP to conduct a business freely (Article 16 of the Charter). The CJEU ruled that the injunction imposing an obligation on the ISP to install and maintain at its expense a complicated and costly computer system to monitor all electronic communications made through the network for an unlimited period of time (so as to protect the rights of copyright holders) disproportionately limits the ISP's freedom to conduct business. The CJEU stated that such an injunction violated the fair balance between the protection of rights enjoyed by copyright holders and the right of freedom to conduct business enjoyed by ISPs. Moreover, the Court noted that the contested injunction may also infringe ISPs' customers data protection and freedom of information. These two additional fundamental rights were taken into consideration when performing the balancing test. The CJEU concluded that the contested injunction would not respect the required fair balance between the right to intellectual property, on the one hand, and the freedom to conduct a business, the right to protection of personal data and the freedom to receive and impart information, on the other hand.⁶⁹

⁶² Article 35 of the draft Regulation and Article 30 of the draft Directive.

⁶³ Article 33 of the draft Regulation.

⁶⁴ Article 28 of the draft Regulation or Article 23 of the draft Directive.

⁶⁵ Article 15 of the draft Regulation and Article 12 of the draft Directive.

⁶⁶ Article 17 of the draft Regulation. See also FRA Symposium Report, p. 7.

⁶⁷ Article 18 of the draft Regulation. See also FRA Symposium Report, p. 9.

⁶⁸ CJEU, Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 24 November 2011.

⁶⁹ *Ibid.* The CJEU adopted the same reasoning in the recent case of *SABAM v. Netlog*: CJEU, C-360/10, *SABAM v. Netlog*, 16 February 2012.

- (46) While noting references to the principle of proportionality in various Recitals of the draft Regulation,⁷⁰ and consequently special arrangements for micro, small and medium-sized enterprises, the option of including a reference to Article 16 of the Charter could enable a balancing of rights which, read in conjunction with Article 52 (1) of the Charter, would take into account all relevant aspects linked to the freedom to conduct a business, not only the size of the enterprise.⁷¹ This approach could also serve to extend a very general reference and emphasise the need to give regard to the cost of implementation contained in the draft instruments.⁷²

2.4. Rights of the child

- (47) Article 3 of the United Nations (UN) Convention on the Rights of the Child (CRC)⁷³ and Article 24 of the Charter enshrine the right of the child to protection and care as is necessary for their well-being. They further guarantee that the child's best interests must be a primary consideration in all actions concerning children.⁷⁴ Article 3 of the CRC takes also into account the rights and duties of the child's parents, legal guardians or other individuals responsible for the child and prescribes the taking of appropriate legislative and administrative measures. The draft Regulation underlines that children deserve specific protection of their personal data but not the draft Directive.⁷⁵
- (48) The draft Regulation recognises that children "may be less aware of risks, consequences safeguards and their rights in relation to the processing of personal data".⁷⁶ From this important statement, the draft Regulation draws in particular two consequences. First, "in relation to the offering of information society services directly to a child", the draft Regulation prescribes that below the age of 13 and without affecting the general contract law of EU Member States, the child's parent or custodian should give or authorise consent to data processing.⁷⁷ Second, the exercise of the 'right to be forgotten and to erasure'⁷⁸ highlights the importance of data "made available by the data subject while he or she was a child". Consideration could be given to specify that the exercise of this right is also applicable when the child is still considered as a child.

⁷⁰ Recitals 11 and 139 of the draft Regulation.

⁷¹ See concerns related to the criteria of the size of business: EDPS Opinion, para. 79, A29 WP Opinion, p. 16.

⁷² Articles 23 and 31 of the draft Regulation or Article 19 and 27 of the draft Directive.

⁷³ United Nations (UN), Convention on the Rights of the Child (CRC), 20 November 1989.

⁷⁴ See ECtHR, *Neulinger and Shuruk v. Switzerland*, No. 41615/07, 6 July 2010, para.135, where the ECtHR notes that there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount. In this case, the ECtHR refers to Article 24 of the Charter.

⁷⁵ See also EDPS Opinion, para. 320 f.

⁷⁶ Recital 29 of the draft Regulation. See EDPS Opinion, para. 128, A29 WP Opinion, p. 13, EESC Opinion, para. 4.19.

⁷⁷ Article 8 of the draft Regulation.

⁷⁸ Article 17 of the draft Regulation.

- (49) The requirement under the draft Regulation⁷⁹ that data protection impact assessments should be carried out prior to processing operations that are likely to present specific risks to the rights and freedoms of the data subjects could include the requirement that impact assessments, as far as possible, be conducted in relation to the processing of data concerning children.

2.5. Right of access to documents

- (50) Although there are indications in the case law that the right of public access to documents could be considered a general principle of EU law, which would also apply at national level, the CJEU has yet to confirm that this is the case.⁸⁰ The right of public access to documents as guaranteed by Article 42 of the Charter, Article 15 of the Treaty on the Functioning of the European Union (TFEU) and Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents⁸¹ only covers access to documents held by the EU institutions.⁸² Regulation 1049/2001 contains an exhaustive list of exceptions to the right of public access, including where disclosure of the document in question would undermine privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data. The application of this exception has proved complicated and, at times, controversial in practice.⁸³
- (51) Twenty-six EU Member States and Croatia have access to information provisions in their national laws.⁸⁴ Furthermore reference can be made to the principles enshrined in Council of Europe Recommendation Rec(2002)2 on access to official documents,⁸⁵ which inspired the drafters of the Council of Europe Convention on Access to Official Documents (Convention 205).⁸⁶ This Convention is the first binding instrument laying

⁷⁹ Article 33 of the draft Regulation.

⁸⁰ CJEU, C-58/94, *Netherlands v. Council*, 30 April 1996, paras. 34-40 and Opinion of Advocate General Tesouro in Case C-58/94, *Netherlands v. Council*, delivered on 28 November, 1995, paras. 14-15.

⁸¹ Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31 May 2001 (hereafter Regulation (EC) 1049/2001).

⁸² See also Article 5 of the Regulation (EC) 1049/2001.

⁸³ See in the EU context: CJEU, C-28/08 P, *European Commission v. The Bavarian Lager Co. Ltd.*, 29 June 2010 and EDPS (2011), *Public access to documents containing personal data after the Bavarian Lager ruling*, Brussels, 24 March 2011; European Commission (2012), *Report from the Commission on the application in 2011 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents*, COM(2012) 429 final, Brussels, 2 August 2012, p. 5 and Council of the European Union (2012), *Tenth annual report on the implementation of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding access to European Parliament, Council and Commission documents*, No. 8260/12, Brussels, 30 March 2012.

⁸⁴ See freedominfo.org at: www.freedominfo.org/regions/europe.

⁸⁵ Council of Europe, Committee of Ministers (2002), Recommendation Rec(2002)2 to member states on access to official documents, 21 February 2002.

⁸⁶ Council of Europe, Convention on Access to Official Documents, CETS No. 205, 18 June 2009. The Convention did not enter into force yet, it is signed by seven EU Member States (BE, DK, EE, HU, LT, SI, SE) and ratified by three EU Member States (HU, LT, SE).

down the right of access to official documents held by public authorities.⁸⁷ This right can be limited on various grounds, including for the protection of privacy and other legitimate private interests.⁸⁸ As stated in the explanatory report to Convention 205, documents containing personal data are covered by Convention 205 since Convention 108 does not prohibit access of third parties to official documents containing personal data.⁸⁹ However, when access to such documents is granted, the use of personal data is governed by data protection guarantees (e.g. Convention 108).

- (52) Both the draft Regulation and the draft Directive allow “the principle of public access to official documents to be taken into account when applying the provisions set out” in the respective draft instruments.⁹⁰ The strengthening of access to information guarantees in both instruments, with a substantive provision, could be considered.⁹¹ Such an amendment would signal the need for a balance to be struck between the protection of personal data and the right of access to documents.

2.6. Considerations

Freedom of expression and information

- (53) The draft Regulation prescribes an exemption related to data processing ‘solely for journalistic purposes’. Consideration could be given to replace the ‘journalistic purposes’ concept with the generic notion of ‘freedom of expression and information’. At the minimum, consideration could be given to enshrine all elements of Recital 121 of the draft Regulation in Article 80 of the draft Regulation (processing of personal data and freedom of expression) which could specifically refer to Article 11 of the Charter.

Freedom of the arts and sciences

- (54) In order to duly take into account the Charter’s guarantees, consideration could be given to insert a specific reference to Article 13 of the Charter in relation to Articles 80 (processing of personal data and freedom of expression) and 83 (processing for historical, statistical and scientific research purposes) of the draft Regulation.

Freedom to conduct a business

- (55) The new obligations for business enshrined in both instruments will entail new costs for these data controllers. Consideration could be given to refer in both instruments to Article 16 of the Charter to ensure a proper balance between data protection and the freedom to conduct a business.

⁸⁷ Article 2 of the Convention 205.

⁸⁸ Article 3 (1) (f) of the Convention 205.

⁸⁹ See Council of Europe, Convention on Access to Official Documents, CETS No. 205, 18 June 2009 – Explanatory Report, para. 16.

⁹⁰ See similar text in Recital 18 of the draft Regulation and Recital 13 of the draft Directive.

⁹¹ See A29 WP Opinion, p. 11 and EDPS Opinion, para. 290 f.

Rights of the child

- (56) The right to be forgotten under Article 17 of the draft Regulation is particularly relevant for the erasure of personal data, which has been made available while the data subject was a child. Consideration could be given to specify that the exercise of this right is also applicable when the child is still considered as a child.
- (57) The requirement that data protection impact assessments be carried out prior to processing operations, which are likely to present specific risks to the rights and freedoms of data subjects under Article 33 of the draft Regulation (data protection impact assessment), could specify that this should, as far as possible, be conducted in relation to processing of data concerning children.

Access to documents

- (58) In order to duly take into account developments with respect to access to documents both at national and international level, consideration could be given to insert a substantive clause on access to documents in both instruments, as prescribed by national legislation. Such an amendment could facilitate the necessary balancing exercise between data protection and the right of access to documents.

3. Non-discrimination

- (59) The rationale behind a specific regulation for sensitive data is to guarantee privacy and non-discrimination.⁹² Article 9 of the draft Regulation which regulates the processing of special categories of personal data builds on the current text of Directive 95/46/EC;⁹³ it prohibits the processing of sensitive personal data. Article 8 of the draft Directive, which also regulates sensitive data processing, takes moreover into account the ECtHR case law.⁹⁴
- (60) The European Commission's impact assessment notes that the transposition of Directive 95/46/EC has resulted in divergent approaches at national level. The European Commission concludes that the concept of sensitive data needed to be further examined, its scope possibly extended and the condition under which sensitive data could be processed better harmonised.⁹⁵ The relevant recitals of the reform package refer to the protection of privacy in relation to the prohibition to process sensitive data; no mention is, however, made of non-discrimination.⁹⁶

⁹² See Article 29 Data Protection Working Party (2011), *Advice paper on special categories of data ("sensitive data")*, Brussels, 4 April 2011.

⁹³ Article 8 of the Directive 95/46/EC.

⁹⁴ The explanatory memorandum to the draft Directive refers at p. 8 to ECtHR, *S. and Marper v. United Kingdom*, No. 30566/04, 4 December 2008.

⁹⁵ Commission Impact Assessment, Annex 2, p. 30.

⁹⁶ See Recital 41 and f. of the draft Regulation and Recital 26 of the draft Directive.

Possibly a better alternative would be to include a specific reference to Article 21 of the Charter in Article 9 of the draft Regulation and Article 8 of the draft Directive.⁹⁷

- (61) Such a direct reference to non-discrimination could enhance the alignment with Article 21 of the Charter. In this context, the relevant recitals or draft articles could also include a specific reference to “sexual orientation” as sensitive data⁹⁸ where the present text refers to “sex life”.
- (62) Furthermore, such direct reference to Article 21 could facilitate measures against both direct and indirect discrimination. The discussion below will illustrate how this could be achieved as concerns the latter.

3.1. Sensitive data and consideration of data for statistical and non-discrimination purposes

- (63) The prohibition to process sensitive data is not absolute. The drafts allow for a number of exceptions, which are all framed with safeguards since the processing of sensitive data could have serious consequences for the data subject if data protection safeguards are not upheld.⁹⁹ Within the limits of these safeguards and under certain conditions, the collection of sensitive data can be beneficial for combating discrimination.
- (64) The European Commission has recognised the importance and the need of data for measuring discrimination and evaluating progress in the implementation of policies. The European Commission has stressed that “accurate data is essential for assessing the scale and nature of discrimination suffered and for designing, adapting, monitoring and evaluating policies. There is considerable demand for data on all grounds of discrimination”.¹⁰⁰

⁹⁷ See as concerns the draft Regulation EESC Opinion, para. 4.16.2. See also the work of modernisation of Convention 108, draft Article 6 refers to the “risk of discrimination”: Consultative Committee on Modernisation of the Convention 108, p. 8.

⁹⁸ Article 9 and 33 (2) (b) of the draft Regulation and Article 8 of the draft Directive. This would be in line with Council of Europe Committee of Ministers Recommendation Rec(2010) on measures to combat discrimination on grounds of sexual orientation or gender identity, of 31 March 2010, para. 19, which states: “Member states should ensure that personal data referring to a person’s sexual orientation or gender identity are not collected, stored or otherwise used by public institutions including in particular within law enforcement structures, except where this is necessary for the performance of specific, lawful and legitimate purposes; existing records which do not comply with these principles should be destroyed.” See also Commission for Human Rights (2011), *Discrimination on grounds of sexual orientation and gender identity in Europe*, 2nd ed., Council of Europe Publishing, 2011, p. 55.

⁹⁹ See also EDPS Opinion, para. 302.

¹⁰⁰ See European Commission (2008), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Non-discrimination and equal opportunities: A renewed commitment*, COM(2008) 420 final, Brussels, 2 July 2008, p. 7.

- (65) The FRA Opinion on Passenger Name Record¹⁰¹ based on the ECtHR¹⁰² and CJEU case law¹⁰³ underlined the importance of the use of statistics for anti-discrimination purposes. In EU law, statistics can be used to give rise to a presumption of discrimination that will trigger a reversal of the burden of proof. To this end, statistics can be useful in court cases. They also serve broader anti-discrimination purposes, such as general or targeted discrimination monitoring, which can provide evidence-based advice to policy makers when shaping measures against discrimination. These statistics can also guide the establishment of positive actions to address discrimination where it has been found to exist.¹⁰⁴
- (66) In practice, however, the collection, production, analysis and dissemination of such statistics serving anti-discrimination purposes is erroneously considered by many as conflicting with the prohibition on the processing of special or sensitive categories of personal data as prescribed in Directive 95/46/EC. The European Commission questioned this perception as regards ethnic data when stating that “it is for the Member States to decide whether or not ethnic data should be collected to produce statistics for combating discrimination, provided that the safeguards set out in the Data Protection Directive [Directive 95/46/EC] are respected.”¹⁰⁵
- (67) Apart from the legal feasibility to collect, under certain conditions, sensitive data for anti-discrimination purposes, there is strong evidence for the general acceptance of the collection of such data. For instance, *Special Eurobarometer 263 on ‘Discrimination in the European Union’* shows that “on average, there is a broad degree of willingness among the European public to provide personal information as part of a census on an anonymous basis to combat discrimination.”¹⁰⁶ This is also the case for persons belonging to minorities as shown in FRA’s European Union Minorities and Discrimination Survey (EU-MIDIS). In sum, 65 % of the 23,500 persons who were interviewed – who had an ethnic minority or immigrant background – declared to be willing to provide information on an anonymous basis

¹⁰¹ See FRA (2011), *FRA Opinion – 1/2011, Passenger Name Record*, Vienna, 14 June 2011 (hereafter FRA PNR Opinion), p. 8 f. See also FRA (2011), *Handbook on European non-discrimination law*, Luxembourg, Publications Office, 2011, p. 29 and f. and p. 129 f. See also FRA (2012), *Handbook on European non-discrimination law case law update July 2010 – December 2011*, 2012.

¹⁰² For an ethnic discrimination case: ECtHR, *D.H. and Others v. the Czech Republic*, No. 57325/00, 13 November 2007.

¹⁰³ For sex discrimination CJEU, Joined Cases C-4/02 and C-5/02, *Hilde Schönheit v. Stadt Frankfurt am Main* and *Silvia Becker v. Land Hessen*, 23 October 2003; and more recently CJEU, Case C-123/10, *Waltraud Brachner v. Pensionsversicherungsanstalt*, 20 October 2011.

¹⁰⁴ See Julie Ringelheim and Olivier de Schutter (2010), *Ethnic monitoring – The processing of racial and ethnic data in anti-discrimination policies: reconciling the promotion of equality with privacy rights*, Brussels, Bruylant, p. 38

¹⁰⁵ See European Commission (2006), *Communication from the Commission to the Council and the European Parliament, The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, COM(2006) 643 final, Brussels, 30 October 2006, p. 9.

¹⁰⁶ Three out of four EU citizens would be willing to provide personal information about their ethnic origin (75 %) and their religion or beliefs (74 %). Willingness to provide information about one’s sexual orientation (65 %) and health situation (71 %) is only somewhat less widespread. See European Commission (2007), *Special Eurobarometer 263 ‘Discrimination in the European Union’*, p. 23.

about their ethnic origin as part of a census if that could help to combat discrimination.¹⁰⁷

- (68) The analysis of data for statistical purposes – including personal data such as self-identified ethnicity or religion/faith – can be undertaken without reference to respondents' personal details such as their name and address. The identification of patterns of possible discrimination (alongside other patterns) is based on an analysis of large datasets that have no need to identify the individual. Rather, scientific confirmation of whether patterns of discrimination might exist is done by analysing the relationship between sets of different variables – such as gender, age and ethnicity – in relation to employment or profiling outcomes, for example; whereupon tests for statistical significance can show whether patterns are likely to be occurring by chance or not, which could indicate possible discrimination.
- (69) Where the number of cases (such as the number of individuals included in a study) falls below a certain value, then the convention in statistics is not to use or publish data where any individual could be identified unless they have explicitly given their consent. This ensures anonymity of data subjects while allowing for an analysis of possible patterns of discrimination. This is different from individual cases of discrimination that are examined in a court of law, where the circumstances of an individual case or cases are addressed, and where reference to a comparator can be made; however, evidence of discriminatory patterns – based on large data sets – can be used in a court of law as supporting evidence with respect to possible discrimination.
- (70) The draft Regulation prescribes a new exception that enables the collection of sensitive data where it is “necessary for historical, statistical or scientific research purposes and subject to the safeguard referred to in Article 83”.¹⁰⁸ To address the above-mentioned unclarity and to provide EU Member States with the appropriate tools, this provision could make explicit that sensitive data can be collected for the purpose of combating discrimination based on the grounds as listed in Article 21 of the Charter.¹⁰⁹
- (71) Such amendments could be inspired by Article 31 of the CRPD,¹¹⁰ which requires State Parties to collect appropriate information that support the formulation of policies aimed at non-discrimination measures for persons with disabilities. This statistical and research data should be collected in compliance with data protection legislation.¹¹¹

¹⁰⁷ FRA (2009), *European Union Minorities and Discrimination Survey (EU-MIDIS), Main Results Report*, Vienna, 2009, p. 272.

¹⁰⁸ Article 9 (2) (i) of the draft Regulation. Article 83 of the draft Regulation regulates the processing of data for historical, statistical and scientific research.

¹⁰⁹ See also draft Article 6 of the modernised Convention 108. See Consultative Committee on Modernisation of the Convention 108, p. 14.

¹¹⁰ UN, Convention on the Rights of Persons with Disabilities (CRPD), 13 December 2006 (hereafter CRPD).

¹¹¹ To date, the CRPD has been ratified by 23 EU Member States and by the EU. Article 31 of the CRPD states:

“1. States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:

- (72) A similar approach could be adopted as regards Article 8 of the draft Directive with a more precise list of exceptions to the sensitive data processing prohibition.¹¹²

3.2. Sensitive data and legal capacity

- (73) The formulation of Article 9 (2) (c) of the draft Regulation, which enables the processing of sensitive data when the data subject is “legally incapable of giving consent” might affect persons with disabilities.¹¹³ Article 9 (2) (c) is relevant in many EU Member States where persons with intellectual disabilities and persons with mental health problems may be deprived of their legal capacity.¹¹⁴ The concept of deprivation of legal capacity, however, is not in full conformity with the CRPD requirements, which most of the EU Member States have ratified. Article 12 of the CRPD recognises that persons with disabilities are “persons before the law” and have legal capacity on an equal basis with others. Article 12 of the CRPD calls for legal reforms to enable supported decision-making. Even when an individual with a disability requires considerable support, the support person’s duty is to enable the individual to exercise their legal capacity, according to the wishes of the individual. The CRPD Committee in charge of monitoring the CRPD implementation has clearly called on governments to review their national legislation in order to replace regimes of substituted decision-making with supported decision-making frameworks.¹¹⁵ An amendment to Article 9 of the draft Regulation could be envisaged to ensure full compliance with the CRPD and Articles 21 and 26 of the Charter (integration of persons with disabilities).

3.3. Sensitive data and profiling

- (74) The draft Regulation and the draft Directive address measures based on profiling.¹¹⁶ The right not to be subject to profiling is a right of the data subject in the draft

(a) Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities;

(b) Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.

2. The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.”

¹¹² See EDPS Opinion, para. 360.

¹¹³ See also EDPS Opinion, para. 130 and A29 WP Opinion, p. 13.

¹¹⁴ See FRA (forthcoming), *Legal capacity of persons with intellectual disabilities and persons with mental health problems*, Luxembourg, Publications Office.

¹¹⁵ See most recently, UN, Committee on the Rights of Persons with Disabilities (2012), *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations prepared by the Committee on the Rights of Persons with Disabilities, Hungary* CRPD/C/HUN/CO/1, Geneva, 27 September 2012, para. 24 f.

¹¹⁶ See Recital 58 and Article 20 of the draft Regulation and Recital 27 and Article 9 of the draft Directive.

Regulation.¹¹⁷ In the draft Directive, it belongs to the data protection principles.¹¹⁸ Both instruments could be aligned so that the measures based on profiling are part of a data subject's rights.

- (75) Both instruments ban automated processing of personal data that would be 'solely' based on 'sensitive data'.¹¹⁹ In the context of the fight against discriminatory ethnic profiling, it could be important to increase the safeguards.¹²⁰ Consideration could be given to add the words 'solely or mainly'.

3.4. Considerations

Non-discrimination

- (76) Provisions on sensitive data aim to protect privacy and non-discrimination. Consideration could be given to include 'sexual orientation' in the list of sensitive data, as laid down in Article 21 of the Charter, in both the draft Regulation and Directive.

Statistical data to fight discrimination

- (77) Statistical data processing of sensitive data can contribute to disclose patterns of discrimination which can be used to devise policies, specific actions and provide expert input to courts. Consideration could be given to insert a specific reference to Article 21 of the Charter in the context of the fight against discrimination through statistical data collection.

Sensitive data and legal capacity

- (78) The deprivation of legal capacity is not in full conformity with the international obligations linked to the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD). Consideration could be given to align Article 9 of the draft Regulation with the requirements of Article 12 of the CRPD on equal recognition before the law.

Sensitive data and profiling

- (79) In the draft Regulation, measures based on profiling and automated processing are enshrined under the data subject rights chapter, while in the draft Directive they are under the principles. To align both instruments, measures based on profiling and automated processing could be placed under the chapter on the rights of the data subject in each instrument.
- (80) Both instruments ban profiling based 'solely' on sensitive data. A wider protection against abuse of sensitive data could be enshrined in both the draft Regulation and

¹¹⁷ Chapter III of the draft Regulation on the Rights of data subjects.

¹¹⁸ Chapter II of the draft Directive on principles.

¹¹⁹ See Article 20 (3) of the draft Regulation and Article 9 (2) of the draft Directive.

¹²⁰ See FRA (2010), *Towards more effective policing – Understanding and preventing discriminatory ethnic profiling – A Guide*, Luxembourg, Publications Office, 2010, p. 22. See also FRA PNR Opinion, p. 6 f.

Directive, if the proposals would prohibit profiling based ‘solely or mainly’ on sensitive data.

4. Access to justice

- (81) According to international law, including European human rights law, states must guarantee everyone the right to access justice through a court or to an alternative dispute resolution body, and to obtain a remedy when their rights are violated. Under Article 47 of the Charter, everyone is entitled to “an effective remedy before a court and to a fair trial”. Furthermore, according to Article 19 (1) of the TEU, “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. Although EU Member States enjoy a margin of discretion in determining what measures are most appropriate for safeguarding rights that individuals derive from EU law, in line with the principle of loyal cooperation as laid down in Article 4 (3) of the TEU, the minimum requirements of effectiveness, equivalence, proportionality and dissuasiveness should be respected.¹²¹
- (82) When it comes to courts, evidence presented by the FRA in its report on access to justice shows that complainants face many barriers threatening the effective enforcement of their rights.¹²² These hurdles are sometimes considered as contradicting the requirements under the Charter and the ECHR.¹²³ These barriers relate, among others, to the cost of court proceedings, narrow legal standing rules as well as to significant delays with proceedings in some EU Member States, all of which discourage individuals from bringing cases to court and hence render their access to justice less effective. Moreover, victims of human rights violations often find existing redress avenues too complex and costly. They also often lack awareness of their substantive and procedural rights, in particular those rights guaranteed in EU and/or international law, and therefore do not seek justice via courts.¹²⁴ According to FRA’s recent findings on access to justice of victims of discrimination in the EU, for example, a key obstacle for complainants when accessing justice is to determine which institution to turn to concerning their

¹²¹ See, for instance, CJEU, C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*, 13 March 2007, paras. 37-39 and 42.

¹²² FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, Luxembourg, Publications Office; and FRA (2010), *European Union Minorities and Discrimination Survey (EU-MIDIS), Data in Focus Report 3, Rights Awareness and Equality Bodies*, Luxembourg, Publications Office, 2010. See also FRA (forthcoming), *Access to justice in cases of discrimination in the EU*, Luxembourg, Publications Office.

¹²³ See for example, CJEU, C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Germany*, 22 December 2010, paras. 28-61; CJEU, C-174/02, *Streekgewest Westelijk Noord-Brabant v. Staatssecretaris van Financiën*, 13 January 2005, para. 18. See also: ECtHR, *Albanese v. Italy*, No. 77924/01, 23 March 2006, para. 74; ECtHR, *Stankov v. Bulgaria*, No. 68490/01, 12 July 2007, paras. 50-55.

¹²⁴ FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, Luxembourg, Publications Office. See also FRA (2012 forthcoming) *Access to justice in cases of discrimination in the EU*, Luxembourg, Publications Office.

discrimination complaints. The multitude of paths available to victims of fundamental rights violations was considered to increase the difficulty in accessing justice.¹²⁵

- (83) The European Commission's impact assessment also underlines that such shortcomings affect the area of data protection.¹²⁶
- (84) Recitals of the two draft instruments reiterate the relevant fundamental rights principles, including existing standards that should be met in order to provide for an effective exercise of the right to access justice.¹²⁷ Yet, relevant substantive provisions of the two instruments could have provided for the necessary details and concrete measures to safeguard access to justice.

4.1. Legal standing

- (85) Legal standing is the gateway to access courts.¹²⁸ Both the draft Regulation and draft Directive¹²⁹ provide for organisations or associations with the right to lodge a complaint on behalf of one or more data subjects before relevant courts will facilitate such access.¹³⁰ At the same time, further broadening of legal standing requirements towards a more generous collective redress mechanism could be envisaged given its overall beneficial impact on enforcement of rights of rights-holders (data subjects) in practice.¹³¹
- (86) In its impact assessment, the European Commission acknowledges the fact that there are "... many cases where an individual is affected by an infringement of data protection rules also affecting a considerable number of other individuals in a similar situation."¹³²
- (87) FRA research findings have confirmed that broadening legal standing to allow for a certain type of public interest action may be a way forward for both courts and other non-judicial institutions (in the present case, national DPAs).¹³³ The on-going European Commission public consultation on the introduction of 'collective redress'

¹²⁵ *Ibid.* See also FRA (2012), *Fundamental rights: challenges and achievements in 2011*, Luxembourg, Publications Office, Focus.

¹²⁶ Commission Impact Assessment, Annex 2, p. 36 f.

¹²⁷ See Recitals 93, 94, 100, 117 and 139 of the draft Regulation and Recitals 53, 56, 63 and 80 of the draft Directive.

¹²⁸ FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, Luxembourg, Publications Office, p. 39.

¹²⁹ Article 76 of the draft Regulation and Article 53 of the draft Directive.

¹³⁰ See also Commission Impact Assessment, Annex 7, p. 129. See also Recital 112 of the draft Regulation.

¹³¹ See also EDPS Opinion, para. 261 and EESC Opinion, paras 1.9. and 4.18.1.

¹³² Commission Impact Assessment, Annex 2, para. 10.10.1.

¹³³ FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, Luxembourg, Publications Office; and FRA (2012), *Fundamental rights: challenges and achievements in 2011*, Luxembourg, Publications Office, p. 205 and f. See also FRA (forthcoming), *Access to justice in cases of discrimination in the EU*, Luxembourg, Publications Office.

shows, nonetheless, notable differences among EU Member States in their approaches to legal standing.¹³⁴

- (88) Yet, all EU Member States allow for some form of public interest actions in relation to environmental cases according to their obligations under the Aarhus Convention.¹³⁵ This suggests that broader rules on legal standing are acceptable in principle and that the EU legislator could consider widening its rules on standing in other areas of law, including those related to data protection law, in particular where individual complaints do not seem to be effective in practice, as highlighted in para. 82.
- (89) The insertion of the right of any body, organisation or association in the draft proposals to lodge a complaint regarding breaches of the protection of personal data – acting in the public interest rather than only on an individual's behalf – could be contemplated. Such an amendment would enable civil society organisations and other bodies working in the data protection field, and having the necessary expertise and knowledge of the legal rules and situation in practice, to take a more direct role in litigation. This would in turn help to ensure better implementation of the data protection law, in particular where certain practices affect a multitude of individuals and/or where the victims of a breach of data protection rules are unlikely to bring individual actions against a data controller, given the costs, delays and burdens they would be exposed to. The introduction of broader legal standing rules would have to be done hand in hand with specific safeguards to preserve the fine balance between preventing abusive litigation and effective access to justice for data subjects.

4.2. Effective redress mechanisms

- (90) Two types of redress mechanisms at national level are prescribed in the proposed reform package. If individuals wish to enforce their data protection rights they can complain to data protection authorities (administrative proceedings) and to courts (judicial proceedings). The reform package builds on the existing clause on redress of Directive 95/46/EC.¹³⁶
- (91) According to well-established jurisprudence of the ECtHR, any remedy available to an individual must meet the criteria of availability, adequacy and effectiveness. It is

¹³⁴ European Commission (2011), *Towards a coherent European approach to collective redress*, SEC(2011)173 final, Brussels 4 February 2011. See also European Parliament (2012), *Standing up for your right(s) in Europe. A Comparative study on Legal Standing (Locus Standi) before the EU and Member States' Courts*, 2012.

¹³⁵ UN, Economic Commission for Europe (UNECE), Article 14 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), Aarhus, 25 June 1998 (hereafter Aarhus Convention). The Aarhus Convention was ratified by all EU Member States as well as the EU itself. For relevant CJEU case law concerning the interpretation of legal standing rules under the Aarhus Convention: CJEU, C-240/09, *Lesoochránárske Zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, 18 March 2011.

¹³⁶ See Articles 73-75 of the draft Regulation and Articles 50-52 of the draft Directive.

not sufficient that a remedy may only be available in theory under the law.¹³⁷ It must also be effective in practice. The effectiveness of the remedy will be hampered in practice for reasons related to, among others, procedural complexity, delays or burdens. These hurdles often restrict or reduce the access left to individuals in such a way or to such an extent that the very essence of the right is impaired.¹³⁸

- (92) The preliminary findings of a FRA fieldwork study on redress mechanisms in the area of data protection seem to indicate that victims of a data protection breach have been reluctant to access courts in order to seek remedy against data controllers. Their reluctance seems to be linked to formalities, costs, delays and uncertainties, but also to a general tendency at national level to rule out the possibility of seeking compensation before court for a violation of data protection rights, due to strict procedural and evidence related requirements. This can result in the effectiveness of the right to a judicial remedy – in practice – coming into question.¹³⁹
- (93) With the data protection reform, DPAs will have the right to impose administrative sanctions.¹⁴⁰ This measure is one of the key powers needed to ensure compliance with data protection obligations as highlighted in existing research by the FRA.¹⁴¹ To enhance the effectiveness of the access to remedy, however, it could be useful to also provide DPAs with the right to award compensation. This would not affect the power of a judge to award compensation or review any decision made by the national DPAs relating to compensation, but would allow for an alternative avenue for compensation.¹⁴²
- (94) DPAs could be the preferred point of access to data protection breaches. They could hear complaints, undertake investigations,¹⁴³ take binding decisions with remedial and/or sanctioning power¹⁴⁴ and award adequate compensation. Such enhanced powers would likely decrease overall costs, delays and formalities of the redress mechanisms at national level.
- (95) A similar structure with a non-judicial body awarding compensation was set-up in the area of non-discrimination. Based on the Racial Equality Directive (RED),¹⁴⁵ national equality bodies were set up in EU Member States to allow for compensation

¹³⁷ See for example: ECtHR, *Kudla v. Poland*, No. 30210/96, 26 October 2000, para. 57 or ECtHR; *MSS v. Belgium and Greece*, No. 30696/09, 21 January 2011, paras. 286-293.

¹³⁸ See for example: ECtHR, *Paul and Audrey Edwards*, No. 46477/99, 14 March 2002, para. 99; ECtHR, *Kadlec v. Czech Republic*, No. 49478/99, 5 May 2004, para. 26 or ECtHR, *Öneryıldız v. Turkey*, No. 48939/99 30, November 2004, paras. 154 and 156.

¹³⁹ FRA (2010), *Data Protection in the European Union: the role of National Data Protection Authorities (Strengthening the fundamental rights architecture in the EU II)*, Luxembourg, Publications Office; as well as FRA (forthcoming) *Redress mechanisms in the area of data protection in the EU*, Luxembourg, Publications Office.

¹⁴⁰ Article 79 of the draft Regulation.

¹⁴¹ FRA (2010), *Data Protection in the European Union: the role of National Data Protection Authorities (Strengthening the fundamental rights architecture in the EU II)*, Luxembourg, Publications Office, p. 8.

¹⁴² Article 75 in conjunction with 77 of the draft Regulation and Article 52 in conjunction with Article 54 of the draft Directive.

¹⁴³ Articles 52 and 53 of the draft Regulation and Articles 45 and 46 of the draft Directive.

¹⁴⁴ Article 79 of the draft Regulation.

¹⁴⁵ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 (hereafter Directive 2000/43/EC).

to be awarded without the affected person having to go to court.¹⁴⁶ The RED at the same time imposes a general obligation on the EU Member States to raise awareness about these avenues with general public, including potential victims.¹⁴⁷

- (96) Both the CJEU and ECtHR accept the validity of non-judicial dispute mechanisms as long as their decisions can be supervised by a judicial body (which itself conforms to the requirements of Article 6 of the ECHR) and as long as the alternative mechanisms themselves conform to general requirements of fairness.¹⁴⁸ One of the stipulations that the relevant case law includes in this respect is the independence and impartiality of the body or official in question.¹⁴⁹
- (97) As recalled by key recitals to both instruments and as prescribed by the draft Regulation and the draft Directive,¹⁵⁰ it is likewise important to ensure adequate staffing and financial resources for national DPAs. In this respect, the FRA recalls its report which contains the opinion on the matter published in 2010.¹⁵¹
- (98) Consideration could therefore be given to streamline the existing redress avenues in EU Member States in the current proposals through common European rules by providing for the compensation powers of national DPAs.

4.2.1. Data protection authorities' independence

- (99) The proposed articles on the independent status of DPAs provide a strong basis for their independence, in particular as regard the nomination process of their members of the governing body.¹⁵² The formulation used is inspired by the ruling of the CJEU, which states: "... the management of the supervisory authorities may be appointed by the parliament or the government."¹⁵³ The FRA recalls its opinion on the independence of DPAs: "It would be advisable for the guarantees of independence [...] to be specified in detail to guarantee effective independence of Data Protection Authorities in practice. It is thus advisable to include a reference to the so-called

¹⁴⁶ The Irish Equality Tribunal, for example, is allowed to award compensation payments to the complainant.

¹⁴⁷ Article 10 of Council Directive 2000/43/EC.

¹⁴⁸ See ECtHR, *Lithgow and Others v. United Kingdom*, Nos. 9006/80; 9262/81, 9263/81, 9265/81, 9266/81, 9313/81 and 9405/81, judgment of 8 July 1986, paras. 201–202; ECtHR, *Rotaru v. Romania*, No. 28341/95 of 4 May 2000, para. 69. Compare ECtHR, *Peck v. the United Kingdom*, No. 44647/98, 28 January 2003, para. 109.

¹⁴⁹ See for general principles of tribunals' independence: ECtHR, *Kleyn and Others v. Netherlands*, Nos. 39343/98, 39651/98, 43147/98 and 46664/99, 6 May 2003, para. 190. See also CJEU, C-506/04 *Graham Wilson v. Ordre des avocats du barreau de Luxembourg*, of 19 September 2006, paras. 47–53. See also comments on the independence raised by the EDPS Opinion paras. 234–236.

¹⁵⁰ Recital 94 of the draft Regulation and Recital 53 of the draft Directive and Article 47 (5) of the draft Regulation and Article 40 (5) of the draft Directive.

¹⁵¹ FRA (2010), *Data Protection in the European Union: the role of National Data Protection Authorities (Strengthening the fundamental rights architecture in the EU II)*, Luxembourg, Publications Office, p. 8. See also FRA Symposium Report, p. 12 f. See also Commission Impact Assessment, Annex 2, p. 42 and A29 WP Opinion, pp. 8 and 17.

¹⁵² See Article 48 (1) of the draft Regulation and Recital 95 of the draft Regulation FRA Symposium Report, p. 10 f. See also EDPS Opinion, para. 236, as concerns the rule of appointment of the members of DPAs.

¹⁵³ CJEU, C-518/07, *Commission v. Germany*, 9 March 2010, para. 44.

‘Paris Principles’ and other available standards in a future revision of the directive in order to offer a more comprehensive definition of independence.”¹⁵⁴

- (100) While data protection authorities have a more focused and narrow mandate than national human rights institutions (NHRIs), they are all meant to be independent monitoring bodies with a role in the fundamental rights field. As observed by the CJEU, DPAs are “the guardians of those fundamental rights and freedoms, and their existence in the Member States is considered, [...], as an essential component of the protection of individuals with regard to the processing of personal data.”¹⁵⁵
- (101) According to the Paris Principles, factors that operate to ensure independence include, firstly, pluralism in the composition of an institution (reflecting the composition of the society); secondly, a suitable infrastructure (in particular adequate funding and budget autonomy); and thirdly, a stable mandate of the institution’s members expressed through appointment and dismissal conditions and the exclusion of voting rights for government representatives within governing bodies of institutions.
- (102) The International Coordinating Committee’s (ICC) Sub-Committee on Accreditation issues interpretations on the way the Paris Principles should be applied. In relation to the appointment of their members, the ICC Sub-Committee underlined the critical importance of the transparent nature of the selection and appointment process of the NHRIs’ governing body. The process should ensure pluralism and independence of the institution concerned.¹⁵⁶
- (103) The Council of Europe Recommendation on the independence and function of regulatory authorities for the broadcasting sector could also be mentioned.¹⁵⁷ This document recommends to Council of Europe Member States to adopt rules that guarantee that the members of these authorities “are appointed in a democratic and transparent manner”.¹⁵⁸ It is thought that such a formulation could secure a “pluralistic nomination procedure”¹⁵⁹ that would prevent the executive or the sole parliamentary majority to control the appointment procedure.¹⁶⁰
- (104) In this context, it is to be noted that the draft Regulation establishes the consistency mechanism,¹⁶¹ which ensures the unity of application of the Regulation in Member

¹⁵⁴ FRA (2010), *Data Protection in the European Union: the role of National Data Protection Authorities (Strengthening the fundamental rights architecture in the EU II)*, Luxembourg, Publications Office, p. 8. See also FRA Symposium Report, p. 11 and f. The ‘Paris Principles’ were adopted in the UN, General Assembly Resolution 48/134, 20 December 1993.

¹⁵⁵ CJEU, C-518/07, *Commission v. Germany*, 9 March 2010, para. 23.

¹⁵⁶ UN, International Coordinating Committee of National Human Rights Institutions (ICC) Sub-Committee on Accreditation (2009), *General Observations*, Geneva, June 2009, Observation No. 2.2.

¹⁵⁷ Council of Europe, Committee of Ministers (2000), Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector, 20 December 2000 and Council of Europe, Committee of Ministers (2008) Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

¹⁵⁸ See Rec(2000)23, para. 5.

¹⁵⁹ FRA (2010), *Data Protection in the European Union: the role of National Data Protection Authorities (Strengthening the fundamental rights architecture in the EU II)*, Luxembourg, Publications Office, p. 8.

¹⁶⁰ See FRA Symposium Report, p. 10 f.

¹⁶¹ Articles 57 to 63 of the draft Regulation.

States. This mechanism gives the Commission not only the power to adopt a reasoned opinion aimed at the suspension of draft measures considered contrary to the correct application of the Regulation,¹⁶² it also gives the European Commission the power to adopt implementing acts.¹⁶³ These powers and their impact on the national data protection authorities' independence may be difficult to reconcile with guarantees under Articles 8 (3) and 47 of the Charter and the international standards of independence as outlined above.¹⁶⁴

4.3. Access to justice for children

- (105) The acknowledgement in the draft Regulation that children "may be less aware of risks, consequences, safeguards and their rights in relation to the processing of personal data"¹⁶⁵ points to the need for children to have the right not only to lodge a complaint to a DPA and/or have the right to a judicial remedy,¹⁶⁶ but also to receive legal advice provided in a child-friendly manner. Similarly, complaint procedures should be made available in a child-friendly manner.¹⁶⁷ In particular, consideration could be given to the provision of adequate legal representation, advice and counselling, as well as free legal aid.¹⁶⁸
- (106) In the specific context of criminal proceedings, consideration could be given to the need to undertake appropriate measures to protect privacy, including personal characteristics and images of victims and family members. In case of a child victim, furthermore, the need to prevent public dissemination of any information that could lead to the identification of a child victim could be considered.¹⁶⁹

4.4. Considerations

Legal standing

- (107) To further enhance the effectiveness of the right to an effective remedy under Article 47 of the Charter (right to an effective remedy and to a fair trial) covered by the two proposals, consideration could be given to further relax legal standing rules to enable organisations acting in the public interest to lodge a complaint. Such

¹⁶² Article 60 of the draft Regulation.

¹⁶³ Article 62 of the draft Regulation.

¹⁶⁴ See EDPS Opinion, para. 251 f.

¹⁶⁵ Recital 29 of the draft Regulation.

¹⁶⁶ Recital 111 and Article 73 of the draft Regulation and recital 60 and Article 50 of the draft Directive.

¹⁶⁷ See Council of Europe Committee of Ministers Guidelines on child friendly justice, adopted on 17 November 2010.

¹⁶⁸ *Ibid.*

¹⁶⁹ See Article 17c of the proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime (COM(2011)0275 – C7-0127/2011 – 2011/0129(COD)) and Council of Europe Committee of Ministers Guidelines on child friendly justice, adopted on 17 November 2010.

broadening of legal standing rules would envisage relevant safeguards to be put in place to preserve the right balance between effective access to remedies and abusive litigation.

Effective redress mechanism

- (108) To empower Data Protection Authorities (DPAs) to award compensation in individual cases, subject to review by the judiciary, could be a way of streamlining the complex redress route for data subjects wishing to pursue their complaint in the area of data protection.
- (109) Both instruments provide for a strong basis for the setting-up of independent DPAs. Consideration could be given to enhance the safeguards relating to the nomination of DPA members of the governing body by ensuring pluralism in the nomination process.

Access to justice for children

- (110) To facilitate access to justice for children, consideration could be given to provide for child-friendly proceedings, such as adequate legal representation, advice and counselling, as well as free legal aid in both the draft Regulation and Directive. In the draft Directive, specific procedural safeguards could further be envisaged to protect the privacy of child victims.

BRYCE Valerie Jane

From: KJAERUM Morten (FRA) [Morten.Kjaerum@fra.europa.eu]
Sent: 02 October 2012 17:48
To: SCHULZ Martin, President
Cc: LÓPEZ AGUILAR Juan Fernando; ALBRECHT Jan Philipp; DROUTSAS Dimitrios
Subject: FRA Opinion on the proposed data protection package
Attachments: Schulz, Martin_DP Opinion_01.10.12.pdf; FRA Opinion Data protection reform package.pdf

Dear President Schulz,

On behalf of Morten Kjaerum please find attached a letter for your attention.

Yours sincerely,
Britta Zimmermann
Personal Assistant to the Director

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02/10/2012