

Brussels, 2 October 2012

## **AGORIA views on the proposal of General Data Protection Regulation with focus on the Delegated powers of the European Commission**

### **Delegated acts to be rejected**

<b>Article 6</b> <b>Lawfulness of processing</b>	
<b>Commission Proposal</b>	<b>Proposed amendment</b>
5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the conditions referred to in point (f) of paragraph 1 for various sectors and data processing situations, including as regards the processing of personal data related to a child.	<i>Delete</i>
<b><i>Justification</i></b>	
Lawfulness of processing is a fundamental principle for both individual's privacy rights and for any privacy compliance program. Any subsequent change to this applicable principle would undermine legal predictability, prevent harmonization of rules across the European Union, both being fundamental objectives pursued by this new Regulation, and without proving to enhance data subject protection in fine.	

<b>Article 9</b> <b>Processing of special categories of personal data</b>	
<b>Commission Proposal</b>	<b>Proposed amendment</b>
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria, conditions and appropriate safeguards for the processing of the special categories of personal data referred to in paragraph 1 and the exemptions laid down in paragraph 2.	<i>Delete</i>
<b><i>Justification</i></b>	
Principles relating to the processing of special categories of personal are a cornerstone of both individual's privacy rights and of privacy compliance. Any subsequent change to applicable principles would undermine legal predictability prevent harmonization of rules across the European Union, both being fundamental objectives pursued by this new Regulation, and without proving to enhance data subject protection.	

Article 14 Information to the data subject	
Commission Proposal	Proposed amendment
7. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria for categories of recipients referred to in point (f) of paragraph 1, the requirements for the notice of potential access referred to in point (g) of paragraph 1, the criteria for the further information necessary referred to in point (h) of paragraph 1 for specific sectors and situations, and the conditions and appropriate safeguards for the exceptions laid down in point (b) of paragraph 5. In doing so, the Commission shall take the appropriate measures for micro, small and medium-sized-enterprises.	<i>Delete</i>
<i>Justification</i>	
The provisions related to information to the data subject are very detailed and self-explanatory. Introducing changes via subsequent delegated acts would create legal uncertainty without improving data subject right and thus not needed.	

Article 15 Right of access for the data subject	
Commission Proposal	Proposed amendment
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the communication to the data subject of the content of the personal data referred to in point (g) of paragraph 1.	<i>Delete</i>
<i>Justification</i>	
Right of access and particularly communication of personal data undergoing processing as provided for under point (g), first indent, shall not be subject to delegated powers, nor any further stringent measures.	

Article 17 Right to be forgotten and erasures	
Commission Proposal	Proposed amendment
<p>9. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying:</p> <p>(a) the criteria and requirements for the application of paragraph 1 for specific sectors and in specific data processing situations;</p> <p>(b) (b) the conditions for deleting links, copies or replications of personal data from publicly available communication services as referred to in paragraph 2;</p> <p>(c) the criteria and conditions for restricting the processing of personal data referred to in paragraph 4.</p>	<i>Delete</i>
<i>Justification</i>	
Provisions of article 17 related to right to be forgotten are very detailed and comprehensive. Delegated acts would create legal uncertainty, hamper effective compliance, and risk altering the key technology neutrality principle which is a governing principle for elaborating EU legislation.	

Article 20 Measures based on profiling	
Commission Proposal	Proposed amendment
<p>5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and conditions for suitable measures to safeguard the data subject's legitimate interests referred to in paragraph 2.</p>	<i>Delete</i>
<i>Justification</i>	
Provisions within Article 20, paragraph 2 , are very clear and shall not be subject to any further delegated acts.	

Article 22 Responsibility of the controller	
Commission Proposal	Proposed amendment
4. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of specifying any further criteria and requirements for appropriate measures referred to in paragraph 1 other than those already referred to in paragraph 2, the conditions for the verification and auditing mechanisms referred to in paragraph 3 and as regards the criteria for proportionality under paragraph 3, and considering specific measures for micro, small and medium-sized-enterprises.	<i>Delete</i>
<i>Justification</i>	
Article 22 and paragraphs 1 and 2 are comprehensive and provide controllers with sufficient flexibility to comply with the specificities that every different case requires. This balanced approach should not be altered with subsequent specifications via delegated acts which would render compliance complex, without improving controllers' ability to enhance data subject rights protection.	

Article 23 Privacy by design and by default	
Commission Proposal	Proposed amendment
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of specifying any further criteria and requirements for appropriate measures and mechanisms referred to in paragraph 1 and 2, in particular for data protection by design requirements applicable across sectors, products and services.	<i>Delete</i>
4. The Commission may lay down technical standards for the requirements laid down in paragraph 1 and 2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).	
<i>Justification</i>	

Privacy by design and privacy by default are important concepts which have far reaching impact. Adoption of subsequent delegated acts could alter the technology neutrality principle which lies at core of the EU decision making-process and as such adoption of subsequent delegated acts should be refrained.

<b>Article 26 Processor</b>	
<b>Commission Proposal</b>	<b>Proposed amendment</b>
5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the responsibilities, duties and tasks in relation to a processor in line with paragraph 1, and conditions which allow facilitating the processing of personal data within a group of undertakings, in particular for the purposes of control and reporting.	<i>Delete</i>
<b>Justification</b>	
Provisions related to the processor are very detailed and self-explanatory. Furthermore, contractual freedom which allows for flexibility and customisation of services on a case by case basis should prevail and be admitted as a principle of law, thus the adoption of subsequent measures should therefore be refrained.	

<b>Article 28 Documentation</b>	
<b>Commission Proposal</b>	<b>Proposed amendment</b>
5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the documentation referred to in paragraph 1, to take account of in particular the responsibilities of the controller and the processor and, if any, the controller's representative.	<i>Delete</i>
<b>Justification</b>	
Documentation requirements are extremely detailed and introduction of subsequent measures via delegated acts would only introduce complexity and 'red-tape' without necessarily enhancing data subjects' protection, thus failing to deliver on the harmonization and simplifications objectives that this Regulation aims to achieve.	

Article 30 Security of processing	
Commission Proposal	Proposed amendment
<p>3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and conditions for the technical and organizational measures referred to in paragraphs 1 and 2, including the determinations of what constitutes the state of the art, for specific sectors and in specific data processing situations, in particular taking account of developments in technology and solutions for privacy by design and data protection by default, unless paragraph 4 applies.</p> <p>4. The Commission may adopt, where necessary, implementing acts for specifying the requirements laid down in paragraphs 1 and 2 to various situations, in particular to:</p> <ul style="list-style-type: none"> <li>(a) prevent any unauthorized access to personal data;</li> <li>(b) prevent any unauthorized disclosure, reading, copying, modification, erasure or removal of personal data;</li> <li>(c) ensure the verification of the lawfulness of processing operations.</li> </ul> <p>Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).</p>	<p><i>Delete</i></p>
<i>Justification</i>	
<p>Provisions on security processing are very detailed and self-explanatory. Any subsequent specifications introduced by delegated acts would only add legal uncertainty and complexity which are against the very core objective of simplification and effectiveness that this new regulation aims at achieving. Furthermore, adoption of subsequent delegated acts related to ‘state of the art’ of technology and related to privacy by design and data protection by default could alter the technology neutrality principle which lies at the very core of the EU decision making-process and as such adoption of subsequent delegated acts should be refrained</p>	

Article 31 Notification of a personal data breach to the supervisory authority	
Commission Proposal	Proposed amendment
<p>5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for establishing the data breach referred to in paragraphs 1 and 2 and for the particular circumstances in which a controller and a processor is required to notify the personal data breach.</p> <p>6. The Commission may lay down the standard format of such notification to the supervisory authority, the procedures applicable to the notification requirement and the form and the modalities for the documentation referred to in paragraph 4, including the time limits for erasure of the information contained therein. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2). [...]</p>	<p><i>Delete</i></p> <p>6. The Commission may lay down the standard format of such notification to the supervisory authority, <b>and</b> the procedures applicable to the <b>filing of reports</b> <del>notification requirement and the form and the modalities for the documentation referred to in paragraph 4, including the time limits for erasure of the information contained therein.</del> Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2). [...]</p>
<i>Justification</i>	
Provisions on security notification are detailed and self-explanatory. Any subsequent specifications introduced by delegated acts would only add legal uncertainty and complexity which are against the very core objectives of simplification and effectiveness that this new regulation aims at achieving.	

Article 32 Notification of a personal data breach to the data subject	
Commission Proposal	Proposed amendment
<p>5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements as to the circumstances in which a personal data breach is likely to adversely affect the personal data referred to in paragraph 1.</p>	<p><i>Delete</i></p>
<i>Justification</i>	
Provisions on security notification are detailed and self-explanatory. Any subsequent specifications introduced by delegated acts would only add legal uncertainty and complexity which are against the very core objectives of simplification and effectiveness that this new regulation aims at achieving.	

Article 33 Data Protection Impact Assessment	
Commission Proposal	Proposed amendment
6. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and conditions for the processing operations likely to present specific risks referred to in paragraphs 1 and 2 and the requirements for the assessment referred to in paragraph 3, including conditions for scalability, verification and auditability. In doing so, the Commission shall consider specific measures for micro, small and medium-sized enterprises.	<i>Delete</i>
<i>Justification</i>	
Provisions related to impact assessment, which refers to a case by case situation, are very detailed and self explanatory. Subsequent measures via delegated acts could create legal uncertainty.	

Article 34 Prior authorisation and prior consultation	
Commission Proposal	Proposed amendment
8. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for determining the high degree of specific risk referred to in point (a) of paragraph 2.	<i>Delete</i>
<i>Justification</i>	
Provisions related to impact assessment which refers to a case by case situation are very detailed and self explanatory and do not require subsequent measures via delegated acts which could create legal uncertainty.	

Article 35 Designation of the data protection officer	
Commission Proposal	Proposed amendment
11. The Commission shall be empowered to adopt delegated acts in accordance with Article	<i>Delete</i>



86 for the purpose of further specifying the criteria and requirements for the core activities of the controller or the processor referred to in point (c) of paragraph 1 and the criteria for the professional qualities of the data protection officer referred to in paragraph 5.	
<i>Justification</i>	
Determination of a data protection officer and designation criteria are already very detailed. Adopting additional prescriptive measures via delegated acts would seriously contradict the fundamental principles of organisational, managerial independence, and contractual freedom of any enterprise which stand all at the very core of any market economy framework.	

Article 37 Tasks of the data protection officer	
Commission Proposal	Proposed amendment
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for tasks, certification, status, powers and resources of the data protection officer referred to in paragraph 1.	<i>Delete</i>
<i>Justification</i>	
Determination of a data protection officer tasks is already very detailed. Adopting additional prescriptive measures via delegated acts would seriously contradict the fundamental principles of organisational, managerial independence, and contractual freedom of any enterprise and which are at the very core of any market economy framework.	

Article 39 Certification	
Commission Proposal	Proposed amendment
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the data protection certification mechanisms referred to in paragraph 1, including conditions for granting and withdrawal, and requirements for recognition within the Union and in third countries.	2. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the data protection certification mechanisms referred to in paragraph 1, including conditions for granting and withdrawal, and requirements for recognition within the Union and in third countries, <i>provided such measures are technology neutral. Self-regulatory schemes</i>

	<i>shall be recognized as valid schemes.</i>
<i>Justification</i>	
Any introduction of certification schemes should be industry driven and ensure that any measures introduced are technology neutral.	

<b>Article 43</b> <b>Transfers by way of binding corporate rules</b>	
<b>Commission Proposal</b>	<b>Proposed amendment</b>
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for binding corporate rules within the meaning of this Article, in particular as regards the criteria for their approval, the application of points (d), (d), (e) and (f) of paragraph 2 to binding corporate rules adhered to by processor and on further necessary requirements to ensure the protection of personal data of the data subject concerned.	<i>Delete</i>
<i>Justification</i>	
Clarity is needed on the criteria and requirements on BCRs at a European level when the Regulation is introduced.	

<b>Article 79</b> <b>Administrative sanctions</b>	
<b>Commission Proposal</b>	<b>Proposed amendment</b>
7. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of updating the amounts of the administrative fines referred to in paragraphs 4, 5 and 6, taking into account the criteria referred to in paragraph 2.	<i>Delete</i>
<i>Justification</i>	
The level setting of administrative sanctions shall be subject to predictable and legal certainty. Furthermore their amendments and changes should be subject to extended decision-making and democratic controls.	

Article 82 Processing in the employment context	
Commission Proposal	Proposed amendment
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the safeguards for the processing of personal data for the purposes referred to in paragraph 1.	<i>Delete</i>
<i>Justification</i>	

Article 83 Processing for historical, statistical and scientific research purposes	
Commission Proposal	Proposed amendment
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for the processing of personal data for the purposes referred to in paragraph 1 and 2 as well as any necessary limitations on the rights of information to and access by the data subject and detailing the conditions and safeguards for the rights of the data subject under these circumstances.	<i>Delete</i>
<i>Justification</i>	

Article 86 Exercise of delegation	
Commission Proposal	Proposed amendment
1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.	1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article. <b><i>Adoption of such delegated act shall be subject to prior impact assessment as defined within the better regulation measures.</i></b>
2. The delegation of power referred to in <b><i>Article 6(5), Article 8(3), Article 9(3), Article 12(5), Article 14(7), Article 15(3), Article 17(9), Article 20(6), Article 22(4), Article 23(3),</i></b>	2. The delegation of power referred to in <del><i>Article 6(5), Article 8(3), Article 9(3),</i></del> Article

<p><i>Article 26(5), Article 28(5), Article 30(3), Article 31(5), Article 32(5), <b>Article 33(6), Article 34(8), Article 35(11), Article 37(2), Article 39(2)</b>, Article 43(3), Article 44(7), <b>Article 79(6)</b>, Article 81(3), Article 82(3) and Article 83(3)</i> shall be conferred on the Commission for an indeterminate period of time from the date of entry into force of this Regulation.</p> <p>3. The delegation of power referred to in <i><b>Article 6(5)</b></i>, Article 8(3), <i><b>Article 9(3)</b></i>, Article 12(5), <i><b>Article 14(7), Article 15(3), Article 17(9), Article 20(6), Article 22(4), Article 23(3), Article 26(5), Article 28(5)</b></i>, Article 30(3), Article 31(5), Article 32(5), <i><b>Article 33(6), Article 34(8), Article 35(11), Article 37(2), Article 39(2)</b></i>, Article 43(3), Article 44(7), <i><b>Article 79(6)</b></i>, Article 81(3), Article 82(3) and Article 83(3) may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.</p> <p>4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.</p> <p>5. A delegated act adopted pursuant to <i><b>Article 6(5)</b></i>, Article 8(3), <i><b>Article 9(3)</b></i>, Article 12(5), <i><b>Article 14(7), Article 15(3), Article 17(9), Article 20(6), Article 22(4), Article 23(3), Article 26(5), Article 28(5)</b></i>, Article 30(3), Article 31(5), Article 32(5), <i><b>Article 33(6), Article 34(8), Article 35(11), Article 37(2), Article 39(2)</b></i>, Article 43(3), Article 44(7), <i><b>Article 79(6)</b></i>, Article 81(3), Article 82(3) and Article 83(3) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a</p>	<p>12(5), <del><i>Article 14(7), Article 15(3), Article 17(9), Article 20(6), Article 22(4), Article 23(3), Article 26(5), Article 28(5), Article 30(3), Article 31(5), Article 32(5), Article 33(6), Article 34(8), Article 35(11), Article 37(2), Article 39(2), Article 43(3)</i></del>, Article 44(7), <del><i>Article 79(6)</i></del>, Article 81(3), Article 82(3) and Article 83(3) shall be conferred on the Commission for an indeterminate period of time from the date of entry into force of this Regulation.</p> <p>3. The delegation of power referred to in <del><i>Article 6(5), Article 8(3), Article 9(3), Article 12(5), Article 14(7), Article 15(3), Article 17(9), Article 20(6), Article 22(4), Article 23(3), Article 26(5), Article 28(5), Article 30(3), Article 31(5), Article 32(5), Article 33(6), Article 34(8), Article 35(11), Article 37(2), Article 39(2), Article 43(3), Article 44(7), Article 79(6), Article 81(3), Article 82(3) and Article 83(3)</i></del> may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.</p> <p>4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.</p> <p>5. A delegated act adopted pursuant to <del><i>Article 6(5), Article 8(3), Article 9(3), Article 12(5), Article 14(7), Article 15(3), Article 17(9), Article 20(6), Article 22(4), Article 23(3), Article 26(5), Article 28(5), Article 30(3), Article 31(5), Article 32(5), Article 33(6), Article 34(8), Article 35(11), Article 37(2), Article 39(2), Article 43(4)</i></del>, Article</p>
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period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or the Council.	44(7), <del>Article 79(6)</del> , Article 81(3), Article <del>82(3)</del> and <del>Article 83(3)</del> shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or the Council.
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### Delegated acts to be maintained under certain conditions

Article 12 Procedures and mechanisms for exercising the rights of the data subject	
Commission Proposal	Proposed amendment
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and conditions for the manifestly excessive requests and the fees referred to in paragraph 4.	<i>Maintain under certain conditions otherwise delete</i>
Justification	
Adoption of clarifying measures for specifying criteria and conditions for excessive requests as well as fees could be envisioned by delegated acts as long as such measures do not add additional cumbersome criteria and processes for controllers. The adoption of clarifying measures should be subject to a clear timetable. Without a clear timeline for adoption data controllers, processors and data subjects could face a lengthy period of uncertainty about their obligations and their rights.	

Article 81 Processing of personal data concerning health	
Commission Proposal	Proposed amendment
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying other reasons of public interest in the area of public health as referred to in point (b) of paragraph 1, as well as criteria and requirements for the	<i>Maintain under certain conditions otherwise delete</i>

safeguards for the processing of personal data for the purposes referred to in paragraph 1.	
<i>Justification</i>	
Adoption of clarifying measures for public health could be envisioned by delegated acts as long as such measures remain strictly limited to harmonizing public interest grounds. The adoption of clarifying measures should be subject to a clear timetable. Without a clear timeline for adoption data controllers, processors and data subjects could face a lengthy period of uncertainty about their obligations and their rights.	

### Delegated acts where AGORIA is neutral

Article 43 Transfers by way of binding corporate rules	
Commission Proposal	Proposed amendment
4. The Commission may specify the format and procedures for the exchange of information by electronic means between controllers, processors and supervisory authorities for binding corporate rules within the meaning of this Article. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 87(2).	
<i>Justification</i>	

Article 44 Derogations	
Commission Proposal	Proposed amendment
7. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying 'important grounds of public interest' within the meaning of point (d) of paragraph 1 as well as the criteria and requirements for appropriate safeguards referred to in point (h) of paragraph 1	

<i>Justification</i>
The adoption of clarifying measures should be subject to a clear timetable. Without a clear timeline for adoption data controllers, processors and data subjects could face a lengthy period of uncertainty about their obligations and their rights.

About AGORIA:

AGORIA is Belgium's largest employers' organization and trade association. The mission of AGORIA is to make every effort to serve its members, bringing all its influence to bear to improve the social and economic environment in which they operate. AGORIA represents and helps more than 1.600 companies in the technology industry. 80% of the members are SMEs and 900 members have a subsidiary abroad. AGORIA represents 13 sectors from the "A" in automotive industry to the "S" in security and defence. The 4 products offered are networking, collective actions, lobbying and individual services. AGORIA represents 283.100 employees, which is 11% of the private employment in Belgium, and has a turnover of 73 billion €. The export rate amounts 74% which is 31% of the Belgian exports.