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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	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 -Chapter V

Introduction

1. The present Directive forms together with the General Data Protection Regulation part of the data protection package.
   At the June 2014 JHA Council the Council reached a partial general approach on Chapter V International Transfer of the General Data Protection Regulation (GDPR).

2. The Presidency has therefore decided to modify Chapter V on International Transfer to take account of the changes retained in the GDPR text from June 2014. At the same time the Presidency has profited from making a couple of substantive changes as well as some cleaning up in order to ensure an internal consistency of the text of the Directive.

A. Consistency with the GDPR

3. The changes under this heading mainly refer to vocabulary such as the introduction of a *international organisation, category of transfer of data* and the addition of *territory and specified sector within a third country* in the different Articles as in the GDPR. The Presidency also suggests to introduce the definition of *international organisation*. Since this notion is used frequently and that there is a definition in the GDPR it seems logical to introduce such a definition in the text of the Directive as well, especially that an accepted definition already exists in the GDPR.

4. Since a couple of delegations found the structure somewhat confusing the Presidency changed it in order to clarify the structure of the Chapter. For that reason the Presidency has reworked paragraph (e) of Article 33 on general principles for transfer. The purpose is to make clear that transfers should in the first place on the basis of an adequacy decision. When no such decision exists transfers can be carried out by way of appropriate safeguards and finally if none of these two options exist transfers can still take place in specific situations. The Presidency therefore considered it necessary to add a reference to Article 36 in Article 33. Article 36 sets out criteria for transfer in the same way as Articles 35 and 36 do.

5. Article 34. 2 on the elements to be taken into consideration has been aligned to the Regulation.

6. In Articles 35 and 36, the Presidency has added in the beginning of each Article "In the absence of ... decision" to clarify that it is only when no adequacy decision exists that a transfer with appropriate safeguards can take place or a transfer in specific situation can take place. The same expression is used in the GDPR.

B. Points of substance

7. The Presidency has moved the text of Article 36a to Article 33 since this is no independent way of transfer. Article 36a set out conditions for transferral of data without the prior authorisation of another Member State.

8. At the request for clarification from some Member States the Presidency has added a sentence in the recitals on agreements concluded by a Member State to flesh out what is meant with a legally binding instrument.

9. At the request of some Member States the Presidency has changed documentation and documents to **registered and records.** The obligation to keep records has been added to Article 36 so that the supervisory authority can verify how and on what basis a transfer has been carried out. *Records* is used elsewhere in the Directive as well as in the Regulation.

C. Internal consistency

10. Since this Chapter was to be discussed the Presidency profited to clean up the text such as for example to add "and for these purposes" where relevant and put them into square brackets.

In light of the above, delegations are invited to

1. Discuss to the new structure, mainly the changes to Article 33 (e) and the additions in the beginning of Articles 35 -36;

2. Agree to the introduction of a definition of *international organisation.*

3. Discuss whether the changes to maintain consistency with the General Data Protection Regulation are necessary/should be maintained (in the individual cases).

ANNEX

Whereas:

(45) Member States should ensure that a transfer to a third country **or to an international organisation** only takes place if it is necessary for the prevention, investigation, detection or prosecution of criminal offences , [and, for these purposes], safeguarding public security, or the execution of criminal penalties, and the controller in the third country or international organisation is an authority competent within the meaning of this Directive. A transfer may take place in cases where the Commission has decided that the third country or international organisation in question ensures an adequate level or protection, or when appropriate safeguards have been adduced **or when derogations for specific situations apply.** [1]

(46) The Commission may decide with effect for the entire Union that certain third countries, or a territory or **one or more** specified sectors within a third country, or an international organisation, offer an adequate level of data protection, thus providing legal certainty and uniformity throughout the Union as regards the third countries or international organisations which are considered to provide such level of protection. In these cases, transfers of personal data to these countries may take place without needing to obtain any specific authorisation.

(47) In line with the fundamental values on which the Union is founded, in particular the protection of human rights, the Commission should take into account how a given third country respects the rule of law, access to justice, as well as international human rights norms and standards and its general and sectoral law, including legislation concerning public security, defence and national security as well as public order and criminal law.

[1] Since DE suggested to remove Article 33.1(c) it suggested to revise recital 45. DE wanted to remove the text restricting transfer only to public authorities because DE meant that it must be possible to make enquiries to companies for example.

(48) The Commission should equally be able to recognise that a third country, or a territory or a specified sector within a third country, or an international organisation, no longer ensures an adequate level of data protection. Consequently the transfer of personal data to that third country **or international organisation** should be prohibited **unless the requirements of Articles 35-36 are fulfilled**. Provision should be made for procedures for consultations between the Commission and such third countries or international organisations. **The Commission should, in a timely manner, inform the third country or international organisation of the reasons and enter into consultations with it in order to remedy the situation.**

(49) Transfers not based on such an adequacy decision should only be allowed where appropriate safeguards have been adduced in a legally binding **and enforceable** instrument, which ensure the protection of the personal data or where the controller (…) has assessed all the circumstances surrounding the data transfer **(…)** and, based on this assessment, considers that appropriate safeguards with respect to the protection of personal data exist. **Such legally binding instruments could for example be legally binding bilateral agreements which have been concluded by the Member States and implemented in their legal order and may be enforced by their data subjects.** Those safeguards should ensure compliance with data protection requirements and the rights of the data subjects, including the right to obtain effective administrative or judicial redress. **W**here no adequacy decision or appropriate safeguards exist, a transfer or a category of transfers could **only** take place **in specific situations** if necessary in order to protect the vital interests of the data subject or another person, or to safeguard legitimate interests of the data subject where the law of the Member State transferring the personal data so provides, or where it is **necessary** for the prevention of an immediate[2] and serious threat to the public security of a Member State or a third country, or in individual cases for the purposes of prevention, investigation, detection or prosecution of criminal offences **[and for these purposes], safeguarding of public security** or the execution of criminal penalties, or in individual cases for the establishment, exercise or defence of legal claims.

[2] ES suggested to replace "immediate" because this word is often misinterpreted and replace it with "direct".

(49a) Where personal data are transferred from a Member State to third countries or international **(…) organisations**, such transfer should, in principle, take place only after the Member State from which the data were obtained has given its authorisation to the transfer. The interests of efficient law enforcement cooperation require that where the nature of a threat to the public security of a Member State or a third country or to the essential interests of a Members State is so immediate as to render it impossible to obtain prior authorisation in good time, the competent public authority should be able to transfer the relevant personal data to the third country **or international organisation** concerned without such prior authorisation. [3]

(72) Specific provisions with regard to the processing of personal data by competent **(…)** authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences [**and for these purposes] safeguarding of public security** or the execution of criminal penalties in acts of the Union which were adopted prior to the date of the adoption of this Directive, regulating the processing of personal data between Member States or the access of designated authorities of Member States to information systems established pursuant to the Treaties, should remain unaffected. The Commission should evaluate the situation with regard to the relationship between this Directive and the acts adopted prior to the date of adoption of this Directive regulating the processing of personal data between Member States or the access of designated authorities of Member States to information systems established pursuant to the Treaties, in order to assess the need for alignment of these specific provisions with this Directive.

[3] DE wanted that it was set out that "prior authorisation" could mean already given authorisation within the EU or generally. CH suggested adding the following sentence in the end of recital 49a: "Furthermore, a transfer of personal data should be lawful if the data subject has given his or her consent to the transfer of his or her personal data for one or more specific purposes." CH considered that processing of personal data should also be lawful if the data subject has given his or her consent to the transfer of his or her personal data. FR wanted to stress that it was for MS to assess all factors that could constitute appropriate and the need to balance all the factors involved.

(73) In order to ensure a comprehensive and coherent protection of personal data in the Union, international agreements concluded by Member States prior to the entry force of this Directive (…), and which are in compliance with the relevant and applicable Union law prior to the entry into force of this Directive, should remain in force until amended, replaced or revoked. To the extend that such agreements are not compatible with Union law, Member States are[4] required to take all appropriate steps to eliminate any incompatibilities (…).

[4] CH suggested adding ",as far as possible,".

CHAPTER I

GENERAL PROVISIONS[5]

Article 3

Definitions[6]

(16) 'international organisation' means an organisation and its subordinate bodies governed by public international law or any other body which is set up by, or on the basis of, an agreement between two or more countries[7];

[5] PL, FI, UK scrutiny reservation on Chapter I. SI critical to Chapters I and II. Cion scrutiny reservation on the text in bold in Chapters I and II.

[6] DE scrutiny reservation. EL, supported by DK, SE and UK, insisted on the need to ensure consistency between the definitions in this instrument and the GDPR, for IT uniformity of application was also important. FI and HU wanted to review the definitions once they had been more formalised in GDPR. ES meant that some positive progress had been made to align this instrument with GDPR but that *e.g.* controllers was particular for the Directive. Cion also welcomed the alignment with the GDPR. UK, supported by IE, thought that a definition of *consent* should be inserted in Article 3 as a possible legal ground for processing. In contrast IT did not approve the idea of a definition of consent. CH noted that in the draft for the modernised Convention 108 consent is legal basis for processing. Cion set out that consent was a legal ground in the 95 Directive and GDPR but thought that it should not be a legal basis for processing in the context of the Directive. Cion meant in the DE examples of blood sample or DNA testing consent was not the legal basis it was the law that required it; it related to consent to the measure. SI agreed with Cion that in law enforcement there was no such thing as a free consent.

[7] Text from the GDPR as agreed by the JHA Council in June 2014.

CHAPTER V

TRANSFER[8] OF PERSONAL DATA TO THIRD COUNTRIES OR INTERNATIONAL ORGANISATIONS[9]

[8] FR found it necessary to define *transfer*.

[9] AT, BE, CH, CZ, CY, DE, DK, EE, FI, FR, IT, NL, NO, PL, PT, RO, SI, UK scrutiny reservation on Chapter V. ES reservation on Chapter V. DE questioned whether the core concept in Chapter V was appropriate and adequacy danger. SE stressed that administrative rules must not make transfer to third countries and international organisations more difficult. FI wanted that the content of Article 14 (transmission to private parties in MS) should be covered in the future as well. FR and BE meant that it was necessary to link Chapter V and Article 60. BE said that its scrutiny reservation was linked to the uncertainty of the role and statute of international organisations in general and Interpol in particular. It was important for BE that the MS could continue to cooperate as they do now. For CZ swift and efficient international information exchange was an important precondition for the protection of fundamental rights by preventing and combating crime. ES raised concernes about the competences assumed by the Commssion in this chapter, which may directly or indirectly affect to security issues that belong to Member States, ES thererfore considered that the potential political impact of Article 34.5 should be carefully assessed. FR was in favour of maintaining the adequacy procedure but meant that is was necessary to preserve the procedures in Articles 35 and 36 since they would be most used by the MS allowing them to continue to exchange data with third countries, due to the low number of adequacy decisions taken on basis of Directive 95/46 and the absence of such a procedure in the DPFD. FR meant that Article 35 should be viewed as enabling MS to maintain exchange with third countries channels with third countries in the absence of adequacy decisions. FR said that it could be necessary to exchange data with third countries not offering an adequate level of protection and that the operational needs required to allow such exchanges must be continued to be carried out. AT wanted that the sequancing of the transfer in Chapter V should be made clear, *i.d.*positive adequacy decision, if no adequacy decision the need for the MS to assess the safeguards offered and in the third place a transfer in the individual case in exceptional circumstances. AT also wanted it to be clarified which possible appropriate safeguards within the meaning of Article 35 could result in a transfer despite a negative adequacy decision. SE wanted that Chapter V be simplified and that it must be clear how the different Articles were related to each other, *e.g.* must the conditions in Article 33 be complied with for transfers based on Articles 34 and 35 and when Article 36 was applied. SE asked whether the possibilities to transfer data were not too limited in the draft text, *e.g.* transfer of data for judicial administratice proceedings with a direct link to combating crime, not even after consent from the initial MS.

Article 33

General principles for transfers of personal data [10]

1. Member States shall provide that any transfer of personal data by competent **(…)** authorities (…) to a third country, or to an international organisation[11], including further onward transfer to another third country or international organisation, may take place only if:[12][13]

[10] PT wanted to see more safeguards in Article 34. The Chair indicated that the equivalent Article had been deleted in the GDPR. AT, FI and PT were against a deletion of Article 33 because the content of Article 13 in DPFD would not be covered. SI was sceptical about the deletion. In contrast BE, CZ, SE supported the deletion. CH, FR entered scrutiny reservations on the possible deletion of Article 33. DE said that the Article did not set out criteria for striking the right balance between data protection and investigation and prosecution of crime. DE criticized that the Directive was drafted in a way that it was not possible to know what was the main rule and which were the exceptions. EE, PL, SE, SI and UK welcomed DE comments about the right balance between data protection and combating crime. DE scrutiny reservation because the scope remained controversial. SE asked how the different Articles in Chapter V were linked and AT how Chapter V fitted into the overall scheme. CZ considered the Article too vague and confusing, and the following problems would arise: Data transfers to victims (or supportive organizations) were probably prohibited, which would be contradictory to the Victims Directive 2012/29/EU; Data transfers to Interpol and international tribunals were put in doubt (the wording "international organizations" was stricter than that of Article 13 DPFD, which spoke about *bodies);* Purposes (a) were excessively limited (appropriate reference to "maintenance of public order" must be included and further purposes must be examined); The relation to Article 36 and 36a was not clear (a reference to Article 36 should be added in point(e) or (e) could be rephrased, in addition a reference to Article 36a should be added in point (d), a possibility to impose a deadline for the Member State from which personal data originated to give its prior authorization should be considered); CZ could also consider copying Article 13 in DPFD. ES meant that the approach of this article was misleading because it looked like international transfers were only possible on the basis of an adequacy decision or appropriate safeguards. ES said that this approach was clearly compromised by Article 36 and ES preferred a more realistic approach. AT wanted that it be ensured that the third State used the data only for the isolated case for which the data were transferred, and that subsequent transfer and/or use for other purposes required the consent of the transferring State and - if the data originally came from another Member State - of the "State of origin" of the data.

[11] FR asked for clarifications as to which organisations were intended. BE meant that the role and status of international organisations should be clarified. Cion accepted to clarify the meaning of *international organisation.* FR asked about the relationship between this Directive and those organisations' specific rules on data protection.

[12] DE suggested to add the following text after "only if" "in addition to the conditions under Article 7" for the sake of legal clarity, including the paragraph 1a (consent by the data subject) suggested by DE

[13] ES considered that the text "may take place only if" needed to be redrafted.

(a) the transfer is necessary for the prevention, investigation, detection or prosecution of [14] criminal offences [**and for these purposes], safeguarding of public security,** or the execution of [15] criminal penalties; [16] and[17]

(b) (…)

(c) the controller in the third country or international organisation[18] is an authority[19] competent for the purposes referred to in Article 1(1); and

(d) in case personal data are transmitted or made available from another Member State,[20] that Member State has given its prior authorisation[21] to the transfer[22] in compliance with its national law[23]; [24] and

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14 AT suggested to add "a specific" before criminal offence in order to clarify that transfer may only take place in a specific case and not as a routine transfer.

15 AT suggested to add "a specific" before criminal penalty in order to clarify that transfer may only take place in a specific case and not as a routine transfer.

16 DE asked whether paragraph (a) could be used outside the purpose of police work, for example in the context of asylum or immigration law. CZ supported that the asylum and immigration law be covered by the Directive. The purpose must be set out in the Directive according to DE. CZ wished to insert a reference to Article 1(1) in paragraph (a) as had been done in paragraph (c).

17 BE suggested to replace *and* with *or* and add the following paragraph "(b) the transfer is necessary for the prevention of criminal offences and in maintaining public order and security for major events, in particular for sporting events or European Council meetings; and" The suggestion comes from Article 14 of the Council Decision 2008/615/JHA Prüm Decision. DE suggested to remove paragraph 1(a) to avoid that the relationship with Article 7 was unclear.

18 NL asked how paragraph (c) tied in with international organisations in criminal prosecution.. Cion accepted to clarify the meaning of *international organisation.* FI thought that paragraphs (c) and (e) needed to be fine tuned and that Interpol should be covered. FI suggested to use *intergovernmental organisation* in accordance with the Vienna Convention on the Law of Treaties. FI thought that the organisations should be set out here, *i.d.* Interpol or that it be made clear in the recitals that Interpol was covered.

19 DE suggested to delete paragraph (c) and revise recital 45 so as not to rule out the possibility for judicial authorities and the police to share information with private parties, this is in particular important for cybercrime.

20 EE said that it sometimes was difficult to know that data had arrived from a third country.

21 DE understood "prior authorisation" to cover authorisations given for transfers within the EU or generally and meant that this should be set out in recital 49a, as was the case in recital 24 in FDDP.

22 AT wanted to add "including further onward transfer," after *transfer* to make clear that the consent in also necessary for subsequent transfer.

23 EE thought that paragraph (d) should be linked to Article 36a.

24 AT suggested to insert another principle after point (d) that transfers may take place only if and insofar as provided for in national law.

(e) the Commission has decided pursuant to Article 34[25] that the third country or international organisation[26] in question ensures an adequate level of protection or in the absence of an adequacy decision poursuant to Article 34, where appropriate safeguards are adduced or exist pursuant to Article 35 [27] **or in the absence of an adequacy decision pursuant to Article 34 or of appropriate safeguards in accordance with Article 35, where derogations for specific situations apply pursuant to Article 36.**

[28]

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[25] AT meant that it was necessary to make a reference to all types of transfer provided for in Chapter V, including Article 36 in order to make it clear that the general basic principles set out in Article 33 (particularly points (c) and (d)) are also fully applicable to transfers referred to in Article 36. Support from FR to mention Article 36.

[26] FR asked for clarifications as to which organisations were intended. BE meant that the role and status of international organisations should be clarified. Cion accepted to clarify the meaning of *international organisation.* FI thought that paragraphs (c) and (e) needed to be fine tuned and that Interpol should be covered. FI suggested to use *intergovernmental organisation* in accordance with the Vienna Convention on the Law of Treaties. FI thought that the organisations should be set out here, *i.d.* Interpol or that it be made clear in the recitals that Interpol was covered.

[27] ES queried whether paragraph (e) did not contradict Article 36 whereas CH, FR, UK suggested to insert a reference to Article 36. NL asked about cooperation agreements with third countries for *i.d.* investigation but that the data could be used in the third country for other purposes than those set out in paragraph (e). NL suggested to insert *consent* to be able to use the data for all purposes. FI meant that, in line with Article 34, a territory or specified sector within a specific third country should be mentioned in paragraph (e). DE wanted to add "or where the personal data are transferred in accordance with Article 36" in the end of paragraph (e) to clarify that Article 36, as well as Articles 34 and 35 can serve as grounds for data transfer.

[28] DE suggested to insert a paragraph 2 with the following wording: "(2) Member States shall provide that the recipient shall be informed of any processing restrictions and be notified that the personal data may be used only for the purposes for which they are transferred. The use for other purposes shall be allowed only with the prior authorisation of the transmitting member state and, in case personal data had been transmitted or made available from another member state to the transmitting member state, the prior authorisation of the other member state too, or in cases where the requirements of Article 36a are fulfilled". DE had taken this text from removed Article 37 because it found it important as it is a general principle for transfer to third countries, however the part on *reasonable steps* had been deleted. DE found it also important that use for other purposes could only be carried out with the consent of the transferring MS, maybe also the MS from where the data originated (like in Article 33.1 (d).

2. Member States shall provide that transfers without the prior authorisation by another Member State in accordance with point (d) shall be permitted only if the transfer of the personal data is ***necessary*** [29] *for the prevention of an immediate*[30] *and serious threat to public security of a Member State or a third country or to essential interests*[31] *of a Member State and the prior authorisation cannot be obtained in good time. The authority responsible for giving prior authorisation shall be informed without delay.*[32]

[29] UK preferred "necessary" to "essential".

[30] ES suggested to replace "immediate" because this word is often misinterpreted and replace it with "direct".

[31] BE asked about the meaning of *essential interest* and whether a common definition existed.

[32] Moved from Article 36a

Article 34

Transfers with an adequacy decision [33]

1. Member States shall provide that a transfer[34] of personal data to a **(...)** third country **or a territory or one or more specified sectors within a third country** or an international organisation may take place where the Commission has decided in accordance with Article 41 of Regulation (EU) …./2012 or in accordance with paragraph 3 of this Article that the third country or a territory or specified sector[35] within that third country, or the international organisation[36] in question ensures an adequate level of protection[37]. Such transfer shall not require any specific authorisation.[38]

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33 DE scrutiny reservation. CH said that in case the GDPR should not constitute an integral part of the Schengen acquis, CH would not be bound by its provisions. However, in order to avoid restrictions in data exchange, CH should continue to be considered a Schengen country regarding the exchange of data between EU MS and CH in the entire area of Schengen and Dublin cooperation. This includes data exchange under the Schengen and Dublin cooperation to which the Data Protection Directive does not apply. DE had doubts if Article 34 corresponded with reality. DE further did not support the Cion's role regarding adequacy decisions. UK supported DE that it was better that the adequacy decision were taken by the MS rather than Cion. DE said that Article 60 and Article 34 were contradictory. ES considered that consistency between the text of GDPR and Article 34 must be ensured so that the adequacy functioned in an equivalent manner. FR wanted a clarification concerning the procedure for adopting an adequacy decision, will it be the same as the current system, *i.e* Article 31 of Directive 1995, and who can refer a matter to the Cion.

34 BE and FR suggested to talk about "any transfer or set of transfer" .

35 The term processing sector was changed to specified sector in Chapter V of GDPR, as agreed at the Council in June 2014. FR asked for example if a State could not be subject of an adequacy decision whereas one of its entities might be, or that an international organisation might ensure an adequate level in one sector but not in another.

36 FR thought that the *international organisations* could be deleted in this paragraph.

37 For SE it was important that the procedure to adopt a Decision on an adequate level of protection was not made too complicated. (FI wanted that adequacy decisions must be made swifter than currently.) FR asked about the meaning of the last sentence of paragraph 1. NL pointed to the low number of countries being considered as having an adequate level of protection by the Cion and meant that a heavy procedure was being created. NL wanted Cion to explain how this procedure would be used for the police and judiciary sectors.

38 BE asked whether the individual MS could have additional requirements. PL meant that since law enforcement authorities would need to react quickly to protect *e.g.* fundamental rights, if there was a general decision by the Cion that would not be possible. DE meant that since *authorisation* could lead to misunderstandings it should be deleted and the following wording be added: " additional assessment in respect of the level of data protection. Decisions taken by the Commission under sentence 1 shall not result in an obligation of Member States to transfer data". With this wording DE also wanted to make clear that there is no obligation to transfer data.

2. Where no decision adopted in accordance with Article 41 of Regulation (EU) …./2012 exists, the Commission [39] shall[40] assess the adequacy of the level of protection, giving consideration to the following elements:

(a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation**, both general and sectoral**, data protection rules (…)[41] including concerning public security, defence, national security and[42] criminal law as well as **(…)** security measures, including rules for onward transfer of personal data to another third country or international organisation,[43] which are complied with in that country or by that international organisation; as well as the existence of effective and enforceable data subject rights and effective administrative and judicial redress for data subjects (…) whose personal data are being transferred; [44]

(b) the existence and effective functioning of one or more independent supervisory authorities in the third country or to which an international organisation is subject, with responsibility (…) for ensuring **and enforcing** compliance with the data protection rules **including adequate sanctioning powers** for assisting and advising (…) data subjects in exercising their rights and for co-operation with the supervisory authorities of the Union and of Member States[45]; and

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39 RO meant that it was necessary to involve the EDPB at this stage.

40 DE suggested to replace *may* with *shall* because it seemed excessive and undesirable that the Cion had to assess the level of protection of all countries in the world and if the Cion found that a country did not have an adequate level of protection it would entail political tensions, DE therefore found it better to leave it to the Cion to decide whether or not to assess the level of protection.

41 DE preferred the Cion text, deleting "data protection rules" and adding "in force, both general and sectoral" after *relevant legislation.*

42 DE wanted to delete *and.*

43 DE preferred the text in the Cion proposal, that is deleting the underlined text from *including* to *organisation.*

44 Cion meant that the equivalent text to Article 34.1(a) was clearer in the GDPR (Article 41.2(a).

45 Cion scrutiny reservation.

(c) the international commitments the third country or international organisation concerned has entered into, or other obligations arising from its participation in multilateral or regional systems, in particular [46] in relation to the protection of personal data. [47]

[48]

2a. The European Data Protection Board shall give the Commission an opinion for the assessment of the adequacy of the level of protection in a third country or international organization, including for the assessment whether a third country or the territory or the international organization or the specified sector no longer ensures an adequate level of protection.

3. The Commission after assessing the adequacy of the level of protection, may decide, within the scope of this Directive that a third country or a territory or **one or more** specified sector**s** within that third country or an international organisation ensures an adequate level of protection within the meaning of paragraph 2. The implementing act shall specify its territorial and sectoral application and, where applicable, identify the supervisory authority**(ies)** mentioned in point (b) of paragraph 2. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 57(2). [49]

4. (…)

4a. The Commission shall monitor the functioning of decisions adopted pursuant to paragraph 3.

[46] DE also here wanted a broader assessment, like in paragraph (a) and therefore suggested adding *especially* before *in relation.* FR asked whether it might not be worth including the agreements and international conventions to which the Union is party, because they must as least be presumed having an adequate level of protection, *e.g.* CoE Convention 108.

[47] DE asked what protection level must be kept. Cion reservation.

[48] DE wanted to add the following text: "The Commission shall, as early as possible, give the Member States the opportunity to comment on each adequacy assessment." because it wanted the MS to be able to comment early in the process.

[49] NL wanted to know how this paragraph would be applied. CZ meant that paragraph 3 should include a duty for the Commission to seek opinion of the EDPB and thought that the role of the EDPB should be the same as in the GDPR. CZ wanted that Paragraph 3 should include possibility of Member States to adopt adequacy decision as well (Article 13 in DPFD.

5. The Commission may decide within the scope of this Directive that a third country or a territory or a specified sector within that third country or an international organisation no longer[50] ensures an adequate level of protection within the meaning of paragraph 2, and may, where necessary, repeal, amend or suspend such decision without retro-active effect.[51] The (…) implementing acts shall be adopted in accordance with the examination procedure referred to in Article 57(2), or, in cases of extreme urgency, in accordance with the procedure referred to in Article 57(3)[52]. At the appropriate time, the Commission shall enter into consultations with the third country or international organisation with a view to remedying the situation giving rise to the decision made pursuant to paragraph 5.[53]

6. Member States shall ensure that where a decision pursuant to paragraph 5 is taken, such decision (…) shall be without prejudice to transfers of personal data to the third country, or the territory or **the** specified sector within that third country, or the international organisation in question pursuant to Articles 35[54] and 36 (…).[55]

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50 AT suggestion.

51 AT suggestion. FR thought that it could be made clearer that the repeal of adequacy decisions were based on monitoring by the Cion, as is provided in paragraph 4a and that it is only if the third country changes its legislation or its practice.

52 DE saw no need for an immediately applicable implementing acts and therefore suggested to delete the text after *57(2)*until *57(3).*

53 BE, CH, CZ, DE, FR, NL, SE welcomed the Chair's suggestion to remove paragraphs 5 and 6 on the blacklist. HU preferred the text of the GDPR and the obligation for the Cion to request the opinion of the EDPB and take its opinion into account. CZ meant that paragraph 3 should include a duty of the Commission to seek opinion of the EDPB. CZ wanted that Paragraph 5 included possibility of Member States to adopt adequacy decision as well. ES found it advisable to better assess what impact this may have on the basis of arts. 35 and 36. ES asked if a decision based on this paragraph would prevent, in general terms, a transfer based on Articles 35 and 36. ES would not be in favor of granting the Commission an indirect way to constraint transfers based on Articles 35 and 36.

54 AT said that if a negative adequacy decision had been taken, a transfer under Article 35 could not be envisaged so therefore should the reference to Article 34 be deleted.

55 PL asked how paragraph 6 was linked to a situation where no adequacy decision existed. PL also asked if the controller could set up additional requirements. NL did not see any added value of this paragraph and suggested to delete it or making a link to the EDPB.

7. The Commission shall publish in the *Official Journal of the European Union* a list of those third countries, territories and specified sectors within a third country and international organisations in respect of which decisions have been taken pursuant to paragraphs 3 and 5.[56]

8. (…)

Article 35

Transfers by way of appropriate safeguards[57]

1. (…)Member States shall provide that, **in the absence of a decision pursuant to paragraph 3 of Article 34,** a transfer[58] of personal data to a third country or an international organisation may take place where:[59]

[56] LV thought that such lists could be published on MS websites. Cion could accept this. CZ thought that there should be a provision requiring the Member States to either publish their adequacy decisions or report them to the Commission. RO did not want the list to contain the countries whose level of protection were not considered adequate (black list) but wanted the Cion to look over and update the list periodically.

[57] EE asked what would happen after the transfer. CZ and FR meant that the MS must be able to conclude bilateral and multilateral agreements. BE queried whether INTERPOL fell within the scope of Article 35 and asked if INTERPOL Rules on Processing of Data ensure an adequate level of protection, BE hoped that a pragmatic approach would be taken on this issue. Cion said that *Interpol* would be falling under both paragraphs 1(a)and (b).
BE meant that in order to preserve the coherence between this proposal and the proposal of Regulation on the establishment of the European Public Prosecutor's Office, BE would like to give the possibilities to MS to exchange the information via INTERPOL on the same conditions as those provided in art 54 of that Regulation ("Personal data shall only be transferred by the European Public Prosecutor's Office to third countries, international organizations, and Interpol if this is necessary for preventing and combating offences that fall under the competence of the European Public Prosecutor's Office and in accordance with this Regulation.")

[58] To align with the GDPR. BE asked to replace *transfer* with *any transfer*. FR preferred to use the plural, *transfers* to make it possible to set up channels for regular and routine data exchange. . IE said that Article 35 and 36 should apply to a category of transfers as well as to a single transfer (Article 44 of GDPR).

[59] AT wanted to reinsert the Cion initial text for the *chapeau.*

(a) appropriate safeguards[60] with respect to the protection of personal data[61] have been adduced in a legally binding **and enforceable** instrument [62]; or

(b) the controller (…) has assessed all the circumstances[63] surrounding [64] **the** transfer of personal data [65] and concludes that appropriate safeguards exist with respect to the protection of personal data. [66]

2. (…) Transfers under paragraph 1 (b) must[67] be (…) **registered** and the **records** [68] must be made available to the supervisory authority on request. [69]

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[60] HU asked what appropriate safeguards was and meant that it could not be a uniform compliance here.

[61] DE meant that it was important that the criteria in Article 34(2) be applied as well and suggested adding the following text after *personal data* "taking account of the criteria set out in Article 34 (2),"

[62] LV, RO, SE and SI asked clarifications on "a legally binding instrument". Cion replied that bilateral legally binding agreements were covered. BE asked whether the general regulations of Interpol would be covered here. CZ suggested to add "such as an agreement concluded by Member State" before *or* to recognize the powers of the individual MS to conclude agreements in this area.

[63] FI suggested that the *circumstances* to be taken into account at the assessment be clearly specified in the Article. Another option according to FI would be to stipulate in line with Article 13.3 of DPFD that the safeguards have been deemed adequate by the MS concerned according to its national law.

[64] DE suggested adding "the individual case of" after *surrounding.*

[65] DE meant that it was important that the criteria in Article 34(2) be applied as well and suggested adding the following text after *personal data* "taking account of the criteria set out in Article 34 (2),"

[66] NL had doubts about the need to keep Article 36.1(b). NL, AT, HU and RO scrutiny reservation on Article 35.1(b). UK thought that it was not clear whether every single processing operation needed safeguards or whether it was more general.

[67] BE suggested to replace *must* with *shall, as far as possible, .*

[68] ES asked for clarifications on what was meant with *documentation* and asked if all aspects of paragraph 1(b) were covered. ES worried that the documentation obligation would impact legal proceedings and procedural laws. ES suggestion.

[69] DE, AT and RO considered the paragraph superfluous since the general documentation requirements in Article 23, for AT Articles 23 in conjunction with Article 18, already applies. HU wanted the text in Article 42.2 in the GDPR and Article 35 in the Directive be consistent and therefore suggested to insert that prior authorisation by the SA would replace the safeguards indicated in the beginning of the paragraph. UK thought that paragraph 2 represented an administrative burden. Cion could accept a broad notion of transfer but the transfer should be documented. DE asked what links existed between Article 35.2 and Article 18.1. FR wanted that a decision on transfer taken by a MS concerning a third country or international organisation should constitute a general transfer towards that state or entity so as to avoid the need to take a new decision for every transfer. SE asked whether this paragraph was still needed after the deletion of parts of Article 35.

Article 36

Derogations for transfer in specific situations[70]

1. (…) Member States shall provide that, in the absence of an adequacy decision pursuant to Article 34 or appropriate safeguards pursuant to Article 35[71], a transfer or a category of transfers[72] of personal data to a third country or an international organisation may take place only on condition that[73]:

(a) the transfer is necessary in order to protect the vital interests of the data subject or another person; or

(b) the transfer is necessary to safeguard legitimate interests of the data subject where the law of the Member State transferring the personal data so provides; or

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70 UK and CZ asked why the derogations could not be set out as permissions and be further specified. Likewise, DE welcomed this but considered that they should not be set out as derogations. DE also saw the need for complementing the list. NL saw the need for a better balance. ES and UK did not approve of the title of the Article. NL considered that the EDPB should ensure consistency. CZ thought that it could be good to transfer data to a natural person in a third country and suggested to add text to this effect.. DE wanted to change the title to "Transfers after weighing of interests" to take account of the interests existing in practice that is data protection interests and *e.g.* the public interest of preventing and solving crimes. AT found tht the wording of Article 36, in particular points (c) to (e) was too broad and preferred to revert to the wording of Article 13(3) of DPFD that takes account of the derogations of Article 2 of the Additional Protocol to CoE Convention 108. AT thought that Article 36 should stipulate clearly that legislation is to provide for such transfers on the basis of *prevailing* public interests.

71 AT suggestion.

72 To align with the GDPR.

73 DE suggested to draft the *chapeau* in the following way, in line with Articles 34 and 35, to indicate that Article 36 was on equal footing with Articles 34 and 35 and should not only set out derogations: "1.(…) Member States shall provide that, a transfer of personal data to a **recipient or recipients in a** third country or an international organisation may take place ". DE used *recipient* to indicate that transfers also could go to private bodies.

(c) the transfer of the data is **necessary** [74] for the prevention[75] of an immediate[76] and serious threat to public security of a Member State or a third country; or

(d) the transfer is necessary[77] in individual cases for the purposes of prevention, investigation, detection or prosecution of criminal offences **[and for these purposes], safeguarding of public security** or the execution of criminal penalties; or[78]

(e) the transfer is necessary[79] in individual cases[80] for the establishment, exercise or defence of legal claims relating to the prevention, investigation, detection **[and for these purposes], safeguarding of public security** or prosecution of a specific criminal offence or the execution of a specific criminal penalty. [81]

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74 UK suggestion.

75 CZ said that paragraph (c) should refer to all purposes in Article 1.1, not only prevention.

76 ES suggested to replace "immediate" because this word is often misinterpreted and replace it with "direct".

77 CZ wanted to exchange *necessary* to *essential* as in paragraph (c) or *required* because the meaning of necessary was unclear.

78 CZ asked what documents would be needed for *e.g.* an EAW being transferred to Interpol.

79 CZ wanted to replace *necessary* to *essential* as in paragraph (c) or *required* because the meaning of necessary was unclear.

80 UK feared that *individual cases* could be interpreted narrowly and therefore suggested to delete these words and explain in the recitals.

81 PL suggested that the *chapeau of the Article* and paragraphs (a) to (e) would form Article 36(1

82 DE suggested adding a paragraph (f) with the following wording: "**(**f) the transfer is necessary in individual cases for compliance with a legal obligation or for the lawful exercise of a legal power the controller is subject to." The text from DE was the same as for Article 7(1)(b). CH suggested inserting a paragraph (f) with the following text: "(f) the data subject has given his or her consent to the transfer of his or her personal data for one or more specific purposes." (this could be used when the transfer is in the interest of the victim).

83 DE suggested adding a paragraph (2) with the following wording: "2. Personal data shall not be transferred, if in the individual case the data subject has protectable interests, especially data protection interests, in the exclusion of the transfer, which override the public interest in the transfer set out in paragraph 1."

2. Transfers under paragraph 1 (a) (c), (d) and (e) must be (…) registered and the records [84] must be made available to the supervisory authority on request.[85]

Article 36a

(…)

Article 37

Specific conditions for the transfer of personal data

(…)

[84] ES asked for clarifications on what was meant with *documentation* and asked if all aspects of paragraph 1(b) were covered. ES worried that the documentation obligation would impact legal proceedings and procedural laws. ES suggested replacing *documented* with "registered" and to replace *documentation* with "records" so as to have a more tech-friendly and future-oriented language.

[85] PL suggestion and ES as regards language.

Article 38

International co-operation for the protection of personal data[86]

(…)[87]

CHAPTER X

FINAL PROVISIONS

Article 60

Relationship with previously concluded international agreements in the field of judicial co-operation in criminal matters and police co-operation[88]

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86 Cion scrutiny reservation against deletion. DE wanted to reinstate Article 38 with a new paragraph (b) with the following wording: " provide the exchange of insights in the level of protection in third countries; this in particular includes the Member States being notified by the Commission of the progress on and the outcome of assessments in accordance with Article 41 of Regulation (EU) ..../2012 and Article 34(2) and (3) of this Directive;" DE added "in the development and" after *mutual assistance* in paragraph (c) first line. In paragraph 2, DE added "supervisory authorities" and the Commission in the first line and deleted the end of the sentence after *supervisory authorities,* in the third line.

87 ES meant that if this article 38 was to be removed it could only be on the basis that within the GDPR the international cooperation is covered with an extensive view and with the scope of this directive included.

88 CH and DE scrutiny reservations. For the UK and CZ Article 60 as it was drafted here was unacceptable. SI said that DPFD was more acceptable and that the text contained no element of flexibility. FR requested the insertion of a grandfather clause, in order to preserve the MS operational exchange channels. FR recalled the link between Article 60 and Chapter V. FR pointed in particular to the fact that the simultaneous promotion of strict rules in Chapter V and the obligation to denounce agreements pursuant to Article 60 would lead to the prohibition of data exchanges which are essential for legitimate public interest aims.
CZ and FR noted that there were no time limits/transition periods foreseen, which entails a more immediate obligation for the MS to denounce and renegotiate their "non-compliant" agreements. FI found the text very ambiguous. For AT the core problem was the dependence on the relevant third countries and that it remained unresolved despite that the-year period for the renegotiation of agreements no longer applied. AT meant that the aim should still be to adapt as soon as possible agreements that do not conform to the provisions of the Directive. AT suggested that intermediate solutions be set out in a recital.

International agreements involving the transfer of personal data to third countries or international organisations which were concluded by Member States prior to the entry **into** force of this Directive and which are in compliance with Union law applicable prior to the entry into force of this Directive shall remain [89]in force until amended, replaced or revoked. In accordance with the Treaties, to the extent that such agreements concluded by Member States are not compatible with union law, the Member State or States concerned shall [90] **m**ake all appropriate **efforts** to eliminate the incompatibilities established.[91]

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[89] BE, supported by CZ, suggested to add "unaffected." and delete the rest of the text of the paragraph so that Article 60 is in line with Article 59 in fine. FR could alternatively agree the Article in line with the BE/CZ suggestion to delete the last sentence. ES could accept the current wording but preferred the deletion of the second sentence. PL supported the deletion of the second sentence of the Article. BE asked it to be clarified what would happen if the Cion withdraw an adequacy decision, would the MS need to renegotiate the agreement. CZ said that first sentence provided for *lex specialis* as regards these agreements, the second sentence was therefore not necessary, it was even contradictory. CZ said that such agreements may well be amended and then the amended wording will remain in force; it could even be said that this is the usual result of amending something, at least in the area of international law.

[90] CH suggested inserting "as far as possible".

[91] AT considered the Article inflexible. CY scrutiny reservation. BE, CH, IT and CZ objected Article 60. CH asked what would happen when there it was need to revoke the agreement but that another Party to the agreement would refuse to renegotiate it. Cion reservation. DE suggested to reword Article 60 as follows: "International agreements involving the transfer of personal data **processed by competent authorities for the purposes referred to in Article 1(1)** to third countries or international organisations which were concluded by Member States prior to the entry into force of this Directive shall remain **unaffected. To** the extent that such agreements concluded by Member States are not compatible with **this Directive**, the Member State or States concerned shall **make** appropriate **efforts** to eliminate the incompatibilities established." DE aligned the first sentence to Article 59 and clarified that existing agreements did not need to be renegotiated.