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**LIMITE**

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**NOTE**

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From: Austrian Delegation  
To: Delegations  
Subject: Comments and Proposals regarding Chapter II, in particular with a view to the issues of “legitimate interest”, “further processing” and “processing for statistical purposes”

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1. Chapter II of the General Data Protection Regulation is of the utmost importance in view of securing the attainment of the protection objectives in that issue. From the Austrian point of view the current draft text namely Article 6 and corresponding recitals do not yet reach these objectives and thus have to be further developed. In order to contribute to a constructive and sound solution Austria would like to offer concrete proposals as attached in Annex I and explained in this cover note below.

2. As regards the issue of “**pseudonymisation**” Austria and others have argued on several occasions that it is just one of more possible tools to improve data security. As long as pseudonymisation is applied within the business sphere of one and the same controller it never ever can justify any easing of obligations set out in the Regulation. Such easing of privileging is only conceivable in the event of processing of pseudonymised data by a controller different to the controller having originally collected and processed the said data and therefore being the only one able to restore the link to individual persons. Having said this, Austria again urges the deletion of recital 23c which is absolutely misleading in view of the correct handling of the definition of “pseudonymisation” as provided in Article 4 paragraph 3b.
3. As for the issue of “**legitimate interest**” Austria recalls its fundamental concerns about the interpretation of Article 6 paragraph 1 point f of the regulatory text as expressed in the current wording of recital 38, 38a, 39 and 40. As already argued on former occasions, Austria is deeply convinced that just referring to a “legitimate interest” of the controller or of a third party must not be considered as an adequate legal basis for the processing of personal data. What must come into play both in regard to the fundamental nature of the right to data protection and with a view to avoid cumbersome discussions about the lawfulness of a processing in practice as well as with regard to the fundamental principle of legal certainty is the element of prevalence of the legitimate interest(s) of the controller in a particular case.
4. Based on the concept of comprehensive responsibility and liability of the controller as set out in Article 5 paragraph 2 in connection with Article 28 paragraph 1 point c the controller should be able to demonstrate by appropriate documentation that he has carefully balanced the interests of the data subject as acknowledged by Union or Member State law against his own legitimate interests and that the latter clearly override the data subjects interest in data protection. Any references to legitimate interests contained in the corresponding recitals (38, 39, 40) have therefore to be specified accordingly. Besides, given the logic of the concept of “overriding legitimate interest” as a basis for lawful data processing in the meaning of Article 6 paragraph 1 point f it does not seem appropriate to just arbitrarily declare “legitimate” single particular processing situations such as proposed in Article 38a. Austria thus urges to delete this recital.

5. Some confusion still seems to exist regarding the correct use and interpretation of the terms “**disclosure**” and “third party” as proves the recent insertion of the text passage “or of a **third party**” in the first sentence of recital 38. As it flows from the text of Directive 95/46/EC<sup>1</sup> the term “disclosure” mainly is used within the context of a transfer of data from a controller to a third party. In addition, there can be no doubt, that a controller other than that originally collecting and processing personal data always will fall under the term “third party”. For this reason the said recent insertion (“or of a third party”) seems to be wrong from a logical point of view. In order to contribute to conceptual clarification Austria would like to propose the insertion of some additional definitions in Article 4.
  
6. The issue of “**further processing**” is to be considered as a particular subset of lawful processing deserving privileged treatment due to a processing purpose very or rather close to the purpose which the respective data have originally been collected for by the same controller (“compatible purpose”); thus, the subject of “further processing” is rightly dealt with in a separate paragraph of Article 6. To make it quite clear: successfully referring to the legal basis of “further processing” basically requires processing of particular data both by one and the same controller and a processing purpose compatible with that of original collection; for assessing compatibility the controller has to refer to the criteria set out in Article 6 paragraph 3a. Based on this approach some corresponding changes in particular regarding recital 40 are to be made.
  
7. Within this context it is essential not to mix the issues of **processing of data for archiving, statistical, historical or scientific purposes** with the concept of further processing as such; a clear distinction has to be made between **two different cases** of processing of personal data for the said purposes:

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<sup>1</sup> See e.g. in Article 7 paragraph e and f, Article 8 paragraph d, Article 11 paragraph 1 in conjunction with recitals 30, 39 of Directive 95/46/EC.

- a. **The first** concerns a situation of collection and processing of data for archiving, statistical, historical or scientific purposes by a controller different from the controller having originally collected and processed such data for any other purpose such as a business or an administrative purpose.

In this case and following the underlying logic of Article 6 the processing of the said data by the controller basically requires a new separate legal basis; in regard of the public interest in providing e.g. statistical data for several purposes, however, it deems appropriate to privilege the collection of data for archiving, statistical etc. purposes on condition that sufficient safeguards for the rights and freedoms of the data subjects are provided.

It is worth pointing out that Article 6 paragraph 2 of the current text as such does not provide for a sufficient legal basis for the case at hand; only together with Article 83 it becomes clear that Union and Member State law may provide for such legal basis which has at the same time to offer sufficient safeguards for the rights and freedoms of the data subjects; it is a matter of fact, that Article 6 paragraph 2 in conjunction with Article 83 do not bring about any harmonization of domestic law governing the collection of data for archiving, statistical etc. purposes, but just clarify that it is up to Member States legislation to enable privileged data usage for the said purposes; based on this understanding of Article 6 paragraph 2 AT can live with the current text.

- b. **The second case** is that of the processing of data for archiving, statistical, historical or scientific purposes by the same controller who has originally collected and processed these data for another purpose.

In particular with regard to the usage of such data for own statistical purposes of the controller and given the specific nature of statistics, namely the fact that they are not aiming at person-oriented results, it deems appropriate to treat such sort of processing under the heading of “further treatment”.

Thus, the further processing of data for statistical purposes not aiming at person-oriented results by the same controller (“secondary statistics”) should be considered as a processing for a compatible purpose in the meaning of Article 5 paragraph 1 point b; as the case of secondary statistics is only one use case of “further processing” it deems appropriate to move the second half sentence of Article 5 paragraph 1 point b to Article 6 paragraph 3 as proposed in the Annex.

8. What is at least as important as the clear distinction between the concept of “further processing” and the specific issue of processing for statistical etc. purposes in the meaning of Article 6 paragraph 2 is the **dissociation of this concept from the issue of “legitimate interest”** of a controller according to Article 6 paragraph 1 point f; in this regard, the current text, again, is mixing up these issues as proves the wording of the last sentence of Article 6 paragraph 4 of the current text; in the light of the considerations above there is absolutely no doubt that the said sentence has to be deleted in order not to put to question the underlying concept of Article 6 in all its entirety.
9. As for the subject matter of **“conditions for consent”** Austria recalls its comments regarding the interpretation of Article 4 paragraph 8 and Article 7 by recital 25 (see footnote 4). In addition Austria rejects the proposed insertion<sup>2</sup> according to council document 17072/3/14. Firstly, Austria does not see any added value with a view to Article 82 paragraph 1. Secondly, the example cited by the said new insertion as being very specific could be misunderstood insofar as aiming at narrowing down the scope of application of Article 82. Furthermore Austria would like to be added in footnote 7 in support of the Commission. As for recital 34 Austria could accept the underlined text in the second sentence on condition that the part “despite it is appropriate in the individual case” is deleted, as it undermines the protective goal of the proposed insertion.

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<sup>2</sup> “Member States may, in accordance with the margin of manoeuvre provided in this Regulation as regards the processing on the basis of the consent of the employee, require in specific cases a written declaration for expressing the employee’s consent.”

10. As for the issue of particular **protection of children**, Austria is of the opinion that Article 8 should keep some regulatory significance in the meaning of ensuring some minimum harmonization throughout the Union. For this Austria is very much in favour of reinserting the concrete threshold of 14 years. In this light, the last part (insertion in bold underlined text) of paragraph 1 should be deleted. Regarding the particular situation of granting authorization by the holder of parental responsibility over the child (paragraph 1a of Article 8) Austria holds the view that a child should have the right to object to any further processing of data after having reached the age of majority. The consent given by the holder of parental responsibility has insofar to be limited in time taking into account the personal character of the right to data protection. Furthermore, Austria objects to the proposed insertion in recital 29 (bold underlined text) as no added value in view of the proper interpretation of Article 8 can be detected. Quite the opposite: the proposed wording rather sounds as if such methods of data collection with children are somehow to be regarded as “state of the art”.
11. As for the relationship between Article 9 and 6 Austria would like to express its view, that it seems more plausible to read Article 9 as a *lex specialis* creating an own subset of legal grounds justifying the processing of sensitive data. The introductory wording of Article 9 paragraph 2 should therefore be amended accordingly. Austria asks to be added in footnote 65 with a view to delete the text in square brackets. As regards the insertion in point f of Article 9 paragraph 2 some restriction in terms of the principle of necessity seems to be needed.
12. Finally, bearing in mind that Chapter II is intrinsically linked to the issue of effective protection of the right to protection of personal data Austria would like to recall its proposals tabled in Council document 15768/14 of 19 November 2014 as well as the common Note from Austria, Slovenia and Hungary to the 3354th Council on 4/5 December 2014 with a view to enabling data protection laws for specific situations in the private sector. Therein the said Member States point to the fact that there is an obligation of the EU and the Member States resulting from Art 8 CFR in conjunction with the established case law on Art 8 ECHR to enact laws governing and as the case may be restricting personal data processing operations carried out by private bodies for private purposes as far as necessary for balancing the individual’s right to data protection with the need of controllers of the private sector to process data. The current text does not yet take account of these obligations.

HAVE ADOPTED THIS REGULATION:

- 23) The principles of data protection should apply to any information concerning an identified or identifiable natural person. **A person is identified if he or she is described by as many identifying elements as are necessary in a given context to single out this person among all others; such elements can be in particular a name, often together with a date and place of birth or an address, or an identification number or a special online identifier, but also specificities relating to the physical, physiological, genetic, economic, cultural or social qualities or status of that person. A person is identifiable if the elements used for describing this person are not sufficient to single out this person from all others in the given context, however, it would be possible for the user of the data to identify this person without unreasonable effort as additional information would likely be available.**<sup>3</sup> ~~Data including pseudonymised data, which could be attributed to a natural person by the use of additional information, should be considered as information on an identifiable natural person. To determine whether a person is identifiable,~~<sup>4</sup> **In this respect**<sup>5</sup> account should be taken of all the means reasonably likely to be used either by the controller or by any other person to identify the individual directly or indirectly.

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<sup>3</sup> AT proposal.

<sup>4</sup> AT proposes to move this part to the end of the recital (see footnote 11 below).

<sup>5</sup> AT proposal.

To ascertain whether means are reasonably likely to be used to identify the individual, ~~account should be taken of~~<sup>6</sup>-all objective factors should be considered<sup>7</sup>, such as the likely purpose to be pursued by the controller<sup>8</sup> or costs of and the amount of time required for identification, taking into consideration both available technology at the time of the processing and technological and economic and social<sup>9</sup> development. The principles of data protection should therefore not apply to anonymous information, that is information which does not relate to an identified or identifiable natural person or to data rendered anonymous in such a way that the data subject is not or no longer identifiable. **However, data including pseudonymised data, which could be attributed to a natural person by the use of additional information, should be considered as information on an identifiable natural person.**<sup>10</sup> This Regulation does therefore not concern the processing of such<sup>11</sup> anonymous information, including for statistical and research purposes. The principles of data protection should not apply to deceased persons, unless information on deceased persons is related to an identified or identifiable natural person<sup>12</sup>.

~~**23e) — In order to create incentives for applying pseudonymisation when processing personal data, measures of pseudonymisation whilst allowing general analysis should be possible within the same controller when the controller has taken technical and organisational measures necessary to ensure that the provisions of this Regulation are implemented, taking into account the respective data processing and ensuring that additional information for attributing the personal data to a specific data subject is kept separately. The controller who processes the data shall also refer to authorised persons within the same controller. In such case however the controller shall make sure that the individual(s) performing the pseudonymisation are not referenced in the meta-data**~~<sup>13 14</sup>

<sup>6</sup> AT proposal for deletion.

<sup>7</sup> AT proposal.

<sup>8</sup> AT proposal.

<sup>9</sup> AT proposal.

<sup>10</sup> AT proposal to insert here the former second sentence of the recital (see footnote 4 above).

<sup>11</sup> AT proposal for deletion.

<sup>12</sup> FR suggested this sentence be deleted.

<sup>13</sup> IE, IT, AT, SE, UK reservation and FR scrutiny reservation on two last sentences.

<sup>14</sup> AT wishes to delete this recital. See justification in point 2 of cover note.



- 24) When using online services, individuals may be associated with online identifiers provided by their devices, applications, tools and protocols, such as Internet Protocol addresses or cookie identifiers. This may leave traces which, when combined with unique identifiers and other information received by the servers, may be used to create profiles of the individuals and identify them. **Identification numbers, location data, online identifiers or other specific factors as such should not (...) be considered as personal data if they do not identify an individual or make an individual identifiable**<sup>15</sup>.
- 25) Consent should be given unambiguously by any appropriate method enabling a freely-given, specific and informed indication of the data subject's wishes, either by a written, including electronic, oral statement of acceptance<sup>16</sup> or, if required by specific circumstances, by any other clearly<sup>17</sup> affirmative action by the data subject signifying his or her agreement to personal data relating to him or her being processed. This could include ticking a box when visiting an Internet website or any other statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of their personal data. Silence or inactivity should therefore not constitute consent. **Where it is technically feasible and effective, the data subject's consent to processing may be given by using the appropriate settings of a browser or other application**<sup>18</sup>. **In such cases it is sufficient that the data subject receives the information needed to give freely specific and informed consent when starting to use the service.**<sup>19</sup> **Member States may, in accordance with the margin of manoeuvre provided in this Regulation as regards the processing on the basis of the consent of the employee, require in specific cases a written declaration for expressing the employee's consent**<sup>20 21</sup>.

<sup>15</sup> DE reservation. **AT and SI thought the last sentence of the recital should be deleted.**

<sup>16</sup> AT proposal.

<sup>17</sup> AT proposal.

<sup>18</sup> PL and AT reservation: they want to delete this as this would result in a lack of transparency for the average user.

<sup>19</sup> AT wishes to delete in pursuance to footnote 19.

<sup>20</sup> Further to DE proposal.

<sup>21</sup> AT wishes to delete this sentence. See justification in point 9 of cover note.

Consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, unambiguous consent should be granted for all of the processing purposes. It is often not possible to fully identify the purpose of data processing for scientific purposes at the time of data collection. Therefore it is necessary to ensure that processing is only lawful when based on another legal ground, since the requirement of specific consent does not allow to cover as yet unknown issues, even when keeping with recognised ethical standards for scientific research<sup>22</sup>. Data subjects should have the opportunity to give their consent only to certain areas of research or parts of research projects to the extent allowed by the intended purpose and provided that this does not involve disproportionate efforts in view of the protective purpose<sup>23</sup>. If the data subject's consent is to be given following an electronic request, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided<sup>24</sup>.

- 29) Children (...) deserve specific protection of their personal data, as they may be less aware of risks, consequences, safeguards and their rights in relation to the processing of personal data. (...) <sup>25</sup>. **This concerns especially the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of child data when using services offered directly to a child<sup>26 27</sup>.**

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<sup>22</sup> IT scrutiny reservation. UK support.

<sup>23</sup> BE, CZ, IE and FR scrutiny reservation; COM reservation.

<sup>24</sup> UK proposed adding: 'Where the intention is to store data for an as yet unknown research purpose or as part of a research resource [such as a biobank or cohort], then this should be explained to data subjects, setting out the types of research that may be involved and any wider implications. This interpretation of consent does not affect the need for derogations from the prohibition on processing sensitive categories of data for scientific purposes'.

<sup>25</sup> COM reservation on deletion of the reference to the UN Convention on the Rights of the Child.

<sup>26</sup> Further to DE proposal.

<sup>27</sup> AT wishes to delete this sentence. See justification in point 10 of cover note.

- 34) In order to safeguard that consent has been freely-given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller and this imbalance makes it unlikely that consent was given freely in all the circumstances of that specific situation. Consent is presumed not to be freely given, if it does not allow separate consent to be given to different data processing operations ~~despite it is appropriate in the individual case,~~<sup>28</sup> or if the performance of a contract is made dependent on the consent despite this is not necessary for such performance and the data subject cannot reasonably obtain equivalent services from another source without consent<sup>29</sup>.
- 35a) This Regulation provides for general rules on data protection and that in specific cases Member States are also empowered to lay down national rules on data protection. The Regulation does therefore not exclude Member State law that defines the circumstances of specific processing situations, including determining more precisely the conditions under which processing of personal data is lawful. National law may also provide for special processing conditions for specific sectors and for the processing of special categories of data. **Further to this the effective protection of the right to protection of personal data pursuant to this Regulation may require the adoption of specific rules for the processing of personal data by a controller in the private sector for non-public purposes such as e.g. private health insurance, private investigation or premise and property protection using video surveillance or other monitoring technology. In this case, Member States may maintain or introduce national provisions determining the specific conditions for the processing of personal data by such controllers whilst fully respecting the framework of this Regulation.**<sup>30</sup>

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<sup>28</sup> AT wishes to delete this sentence. See justification in point 9 of cover note.

<sup>29</sup> COM, DK, IE and FR, SE reservation. CZ thought the wording should be made a bit more abstract.

<sup>30</sup> Taken from Council document 15768/14 (AT proposal).

38) The legitimate interests of a controller ~~including or of a third party including~~<sup>31</sup> a controller to which the data may be disclosed ~~or of a third party~~ may provide a legal basis for processing, provided that they clearly override the<sup>32</sup> interests or the fundamental rights and freedoms of the data subject **are not overriding**. ~~Legitimate interest could exist for example when there is a relevant and appropriate connection between the data subject and the controller in situations such as the data subject being a client or in the service of the controller~~<sup>33 34</sup> (...). The presence of a legitimate interest would need careful assessment including whether a data subject can expect at the time and in the context of the collection of the data that processing for this purpose may take place. In particular such assessment must take into account whether the data subject is a child, given that children deserve specific protection.

**However, just referring to a “legitimate interest” of the controller or of a third party must not be considered as an adequate legal basis for the processing of personal data. Bearing in mind both the fundamental nature of the right to data protection as well as the need to promote legal certainty in everyday life as a second element the prevalence of the “legitimate interest” of the controller in a particular case has to come into play.**<sup>35</sup>  
**According to the concept of comprehensive responsibility and liability of the controller as set out in Article 5 paragraph 2 in connection with Article 28 paragraph 1 point c the controller should be able to demonstrate by appropriate documentation that he has carefully balanced the interests of the data subject as acknowledged by Union or Member State law against his own legitimate interests and that the latter clearly override the data subjects interest in data protection.**

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<sup>31</sup> AT proposal; see justification in point 5 of cover note.

<sup>32</sup> AT proposal; see justification in points 3 and following of cover note.

<sup>33</sup> HU scrutiny reservation.

<sup>34</sup> As this sentence concerns the specific issue of „further processing“ AT proposes to move it to recital 40.

<sup>35</sup> AT proposal.

The data subject should have the right to object to the processing, on **reasoned**<sup>36</sup> grounds **relating to their particular situation**<sup>37</sup> and free of charge. To ensure transparency, the controller should be obliged to explicitly inform the data subject on the legitimate interests pursued and on the right to object, and also be obliged to document these legitimate interests. (...)

~~**38a) Controllers that are part of a group of undertakings have a legitimate interest to transmit personal data within the group of undertakings for internal administrative purposes. The general principles for the transfer of personal data to third countries or international organizations remain unaffected**<sup>38 39</sup>~~

40) The processing of personal data by the same controller<sup>40</sup> for other purposes than the purposes for which the data have been initially collected should be only allowed where the processing is compatible with those purposes for which the data have been initially collected. **A purpose can only be considered as compatible on condition that it is very or rather close to the purpose which the respective data have originally been collected for by the same controller. In order to assess the compatibility of a purpose the controller has to refer to the criteria set out in Article 6 paragraph 3a.**<sup>41</sup> **It may be seen as an indication for compatibility for example that there is a relevant and appropriate connection between the data subject and the controller such as the data subject being a client or in the service of the controller.**<sup>42</sup> (...)

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<sup>36</sup> AT proposal in order to compensate the proposed deletion according to footnote 35.

<sup>37</sup> AT proposes to delete this sentence as it is not plausible that a data subject's right to object should depend on a situation exclusively affecting this single person.

<sup>38</sup> DE proposal.

<sup>39</sup> AT wishes to delete this recital. See justification in point 4 of cover note.

<sup>40</sup> AT proposal.

<sup>41</sup> AT proposal.

<sup>42</sup> Modified second sentence from recital 38.

In order to ascertain whether a purpose of further processing is compatible with the purpose for which the data are initially collected, the controller, after having met all the requirements for the lawfulness of the original processing, should take into account any link between those purposes and the purposes of the intended further processing, the context in which the data have been collected, including the reasonable expectations of the data subject as to their further use, the nature of the personal data., the consequences of the intended further processing for data subjects, and the existence of appropriate safeguards in both the original and intended processing operations.<sup>43</sup> In such case no separate legal basis is required other than the one which allowed the collection of the data. (...)<sup>44</sup>

Where the intended other purpose is not compatible with the initial one for which the data are collected, the controller should obtain the consent of the data subject for this other purpose or should base the processing on another legitimate ground for lawful processing, in particular where provided by Union law or the law of the Member State to which the controller is subject. (...)<sup>45</sup>. In any case, the application of the principles set out by this Regulation and in particular the information of the data subject on those other purposes and on his or her rights should be ensured, including the right to object<sup>46</sup>, should be ensured. (...). ~~Indicating possible criminal acts or threats to public security by the controller and transmitting these data to a competent authority should be regarded as being in the legitimate interest pursued by the controller~~<sup>47</sup>. However such transmission in the legitimate interest of the controller or further processing of personal data should be prohibited if the processing is not compatible with a legal, professional or other binding obligation of secrecy.<sup>48 - 49</sup>

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<sup>43</sup> AT proposes deletion as these criteria do not seem appropriate within this particular context.

<sup>44</sup> Moved here from below (see footnote 50).

<sup>45</sup> Deleted at the request of FR, HU, IT, PL and RO.

<sup>46</sup> Further to FR proposal.

<sup>47</sup> AT reservation wishes to delete the sentence as it goes much to far and could be misunderstood as a licence for excessive private surveillance activity.

<sup>48</sup> IE, SE and UK queried the last sentence of recital 40, which was not reflected in the body of the text. DE, supported by GR, wanted it to be made clear that Article 6 did not hamper direct marketing or credit information services or businesses in general according to GR.

<sup>49</sup> This issue is out of place here as it is primarily referring to the “legitimate interest” of a controller.

~~In such case no separate legal basis is required other than the one which allowed the collection of the data. (...)~~<sup>50</sup> **If the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, Union law or Member State law may determine and specify the tasks and purposes for which the further processing shall be regarded as lawful**<sup>51, 52</sup> The further processing **by the same controller who has initially collected and processed these data**<sup>53</sup> (...) for archiving purposes in the public interest or, statistical, scientific or historical (...) purposes (...) or in view of future dispute resolution<sup>54</sup> should be considered as compatible lawful processing operations. (...)<sup>55</sup>. **Archiving, statistical, scientific or historical purposes refer to data processing operations whose goal is as a general rule not to obtain results in a form relating to specific data subjects.**<sup>56</sup>

[]<sup>57</sup>

- 42) Derogating from the prohibition on processing sensitive categories of data should also be allowed when provided for in Union or Member State law, and subject to suitable safeguards, so as **to** protect personal data and other fundamental rights, where (...) grounds of public interest so justify, in particular *processing data for health security, **monitoring and alert purposes**,<sup>58</sup> the prevention or control of communicable diseases and other serious (...) threats to health or ensuring high standards of quality and safety of health care and services and of medicinal products or medical devices or assessing public policies adopted in the field of health, also by producing quality and activity indicators.*

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<sup>50</sup> Moved upwards (see after footnote 43).

<sup>51</sup> DE proposal.

<sup>52</sup> AT wishes to delete this sentence as there is no direct link to the issue of further processing. A public controller always has to rely on a specific legal bases provided for in general law.

<sup>53</sup> AT proposal.

<sup>54</sup> ES pointed out the text of Article 6 had not been modified.

<sup>55</sup> DE proposal, supported by MT and GR. AT, BE, CY, ES, FR, HU, IT and UK reservation.

<sup>56</sup> AT proposal taken from Council document 15768/14.

<sup>57</sup> Text has been moved upwards (see text above before footnote 43 and 48).

<sup>58</sup> AT wishes to delete this text as it seems being too vague.

[...]

A derogation should also allow processing of such data where necessary for the establishment, exercise or defence of legal claims, regardless of whether in a judicial procedure or whether in an administrative ~~or any out-of-court~~<sup>59</sup>-procedure.

#### Article 4

#### Definitions

**(3a) ,further processing‘ means the processing of personal data for an additional purpose by the same controller who initially collected the data;**<sup>60</sup>

**(3ab) ,transfer‘ means the transmission of personal data to any recipient, whether controller or processor;**<sup>61</sup>

**(3ac) ‘disclosure‘ means the transfer of personal data to another controller, including the publication of personal data;**<sup>62</sup>

(5) 'controller' means the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes (...) and means of the processing of personal data; where the purposes (...) and means of processing are determined by Union law or Member State law, the **lawful**<sup>63</sup> controller or the specific criteria for his nomination may be designated by Union law or by Member State law;

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<sup>59</sup> AT wishes to delete this text as it seems being too broad.

<sup>60</sup> AT proposal.

<sup>61</sup> AT proposal.

<sup>62</sup> AT proposal.

<sup>63</sup> AT proposal.



- (8) 'the data subject's consent' means any freely-given, specific and informed (...) indication of his or her wishes by which the data subject, either by a statement **of acceptance**<sup>64</sup> or by a **another**<sup>65</sup> clearly affirmative action, signifies agreement to personal data relating to them being processed;

## CHAPTER II

### PRINCIPLES

#### *Article 5*

#### *Principles relating to personal data processing*

##### 1. Personal data must be:

- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject;
- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes; ~~further processing of personal data for archiving purposes in the public interest or scientific, statistical or historical purposes shall in accordance with Article 83 not be considered incompatible with the initial purposes;~~<sup>66</sup>

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<sup>64</sup> AT proposal.

<sup>65</sup> AT proposal.

<sup>66</sup> AT proposes to move this part to Article 6 paragraph 3a.

- (c) adequate, relevant, and ~~not excessive in relation to the purposes for which they are processed~~ **limited to the minimum necessary in relation to the purposes for which they are processed;**<sup>67</sup> [...];

[...]

- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed, **unless explicitly foreseen otherwise in this Regulation, particularly in Article 83**<sup>68</sup> (...); ~~personal data may be stored for longer periods insofar as the data will be processed for archiving purposes in the public interest or *scientific*, statistical, or historical purposes in accordance with Article 83 subject to implementation of the appropriate technical and organisational measures required by the Regulation in order to safeguard the rights and freedoms of data subject;~~

## Article 6

### Lawfulness of processing

1. Processing of personal data shall be lawful only if and to the extent that at least one of the following applies:

[...]

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<sup>67</sup> AT proposal to reinsert original Commission proposal.

<sup>68</sup> AT proposal.

- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party **which are overriding the**<sup>69</sup> ~~except where such interests are overridden by the~~ interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. (...).
2. Processing of personal data which is necessary for archiving purposes in the public interest, or for historical, statistical or scientific purposes shall be lawful subject also to the conditions and safeguards referred to in Article 83.
3. The basis for the processing referred to in points (c) and (e) of paragraph 1 must be established in accordance with:
- (a) Union law, or
- (b) national law of the Member State to which the controller is subject.

The purpose of the processing shall be determined in this legal basis or as regards the processing referred to in point (e) of paragraph 1, be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. This legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia the general conditions governing the lawfulness of data processing by the controller, the type of data which are subject to the processing, the data subjects concerned; the entities to, and the purposes for which the data may be disclosed; the purpose limitation; storage periods and processing operations and processing procedures, including measures to ensure lawful and fair processing, including for other specific processing situations as provided for in Chapter IX.

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<sup>69</sup> AT proposal.

**When relying on Article 6 (f) as a legal basis for processing personal data, the controller must be able to demonstrate by appropriate documentation that he has carefully balanced his interests, as acknowledged by Union or Member State law, against the interests of the data subjects and has established that his legitimate interests in processing indeed override the interests in protection of the fundamental rights and freedoms of the data subjects. On request, data subjects must be given access to the documentation on the controller’s reasoning. Data subjects and their representatives according to Article 76 have the right to disclose such documentation to the public.**<sup>70</sup>

**To the extent necessary for the protection of the right to data protection in specific situations Member States may maintain or introduce national provisions determining the specific conditions for the processing of personal data by controllers of the private sector carried out for non-public purposes. Any such legislation shall fully respect the framework of this Regulation.**<sup>71</sup>

**3a. Further processing of personal data for archiving purposes in the public interest, for statistical, scientific or historical purposes shall not be considered incompatible with the initial purposes, provided that the special conditions and safeguards referred to in Article 83 have been enacted by the controller.**<sup>72</sup>

In order to ascertain whether a purpose of further processing by the same controller<sup>73</sup> is compatible with the one for which the data ~~are~~ were initially collected, the controller shall take into account, unless the data subject has given consent<sup>74</sup>, inter alia<sup>75</sup>:

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<sup>70</sup> AT proposal.

<sup>71</sup> Taken from Council document 15768/14 (AT-proposal).

<sup>72</sup> AT proposes to insert here the text from Article 5 paragraph b second sentence and to add some supplementary wording.

<sup>73</sup> AT proposal.

<sup>74</sup> DK and IT scrutiny reservation; IT deemed this irrelevant to compatibility test.

<sup>75</sup> DK, FI, NL, RO, SI and SE stressed the list should not be exhaustive. PT suggested adding consent. DE thought this paragraph should only be in the recital.

- (a) any link between the purposes for which the data have been **initially**<sup>76</sup> collected by the controller<sup>77</sup> and the purposes of the intended further processing;
- (b) the context in which the data have been collected;
- (c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9;
- (ca) the reasonable expectations of the data subject concerning fair processing.**<sup>78</sup>
- ~~(d) the possible consequences of the intended further processing for data subjects;~~<sup>79</sup>
- ~~(e) the existence of appropriate safeguards~~<sup>80 81</sup>

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<sup>76</sup> AT proposal.

<sup>77</sup> AT proposal.

<sup>78</sup> AT proposal.

<sup>79</sup> AT proposal for deletion.

<sup>80</sup> BG, DE, SK and PL reservation: safeguards as such do not make further processing compatible. FR queried to which processing this criterion related: the initial or further processing. DE pleaded for the deletion of paragraph 3a.

<sup>81</sup> AT proposal for deletion.

4. (...) <sup>82</sup> Where the purpose of further processing is incompatible with the one for which the personal data have been collected **by the same controller**, <sup>83</sup> the further processing must have a legal basis at least in one of the grounds referred to in points (a) to (e) <sup>84</sup> of paragraph 1 <sup>85</sup> <sup>86</sup>. Further processing for incompatible purposes on grounds of legitimate interests of the controller or a third party shall be lawful if these interests override the interests of the data subject.
5. (...) <sup>87</sup>

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<sup>82</sup> Deleted further to the request from AT, FI, HU, IE and, IT and COM.

<sup>83</sup> AT proposal.

<sup>84</sup> (f) was added further to the request by DK, ES, FR and NL and agreeable to BE, IE, HR and UK. COM, DE, FI, HU and IT pleaded for its deletion.

<sup>85</sup> ES, AT and PL reservation; DE, HU scrutiny reservation. BE queried whether this allowed for a hidden 'opt-in', e.g. regarding direct marketing operations, which COM referred to in recital 40. BE, supported by FR, suggested adding 'if the process concerns the data mentioned in Articles 8 and 9'.

<sup>86</sup> HU, supported by BG and SK, thought that a duty for the data controller to inform the data subject of a change of legal basis should be added here: 'Where personal data relating to the data subject are processed under this provision the controller shall inform the data subject according to Article 14 before the time of or within a reasonable period after the commencement of the first operation or set of operations performed upon the personal data for the purpose of further processing not compatible with the one for which the personal data have been collected.' FR and AT also underscored the importparticularyance of informing the data subject of such further processing.

<sup>87</sup> DE asked for reinserting this paragraph.

Article 8

Conditions applicable to child's consent in relation to information society services<sup>88</sup>

1. Where Article 6 (1)(a) applies, in relation to the offering of information society services directly to a child<sup>89</sup>, the processing of personal data of a child **below the age of 14 years** (...) shall only be lawful if and to the extent that such consent is given or authorised by the holder of parental responsibility over the child ~~or is given by the child in circumstances where it is treated as valid by Union or Member State law<sup>90</sup>~~. **In such a case after having reached the age of majority a child shall have the right to object to any further processing of data.**<sup>91</sup>

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<sup>88</sup> CZ, MT, ES, SI and UK would prefer to see this Article deleted . AT, BE, CY, DE, GR, HR, IE, IT and RO saw the merit of a provision on child protection in some form. FR, supported by EE, DK, SE and PL, suggested deleting this Article and instead inserting particular provision for children when the Articles of the data subjects' rights were discussed, *e.g.* Article 20 on profiling.

<sup>89</sup> Several delegations (DE, HU, ES, FR, SE, SK, PT) disagreed with the restriction of the scope and thought the phrase 'in relation to the offering of information society services directly to a child' should be deleted. COM clarified that this provision was also intended to cover the use of social networks, insofar as this was not governed by contract law.

<sup>90</sup> UK suggestion.

<sup>91</sup> AT proposal.

Article 9

*Processing of special categories of personal data*<sup>92</sup>

2. Paragraph 1 shall not apply if one of the following applies [and Article 6 **(1)** is complied with<sup>93</sup>]:

[...]

(f) processing is necessary for the establishment, exercise or defence of legal claims **or is necessary**<sup>94</sup> ~~whenever for~~<sup>95</sup> courts ~~when are~~ acting in their judicial capacity<sup>96</sup>; or

4.a In case a transfer of personal data referred to Article 44(1)(f) involves personal data concerning health such transfer can take place only subject to the condition that those data will be processed by a health professional subject to the obligation of professional secrecy under the law of the third State concerned or rules established by national competent bodies to the obligation of ~~professional~~ secrecy, or by another person also subject to an (...) obligation of secrecy under the law of the third State concerned or rules established by national competent bodies<sup>97 98</sup>.

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<sup>92</sup> COM, DK, SE, AT and NL scrutiny reservation. SK thought the inclusion of biometric data should be considered.

<sup>93</sup> FR and IT reservation (possibly restrict it by referring to Article 6(3)a); Article 9 is lex specialis. **AT wants to delete part in square brackets.**

<sup>94</sup> AT proposal.

<sup>95</sup> AT proposal.

<sup>96</sup> IE proposal.

<sup>97</sup> COM, CZ, DK, IE, NL, PT and FI reservation: they thought this could be deleted; BE, AT, PL and UK scrutiny reservation. FR, supported by SK, proposed also to add an obligation of pseudonymisation. EE, NL, FI and COM thought that, if kept, this should be regulated in Chapter V.

<sup>98</sup> AT is of the view, that this article should not rule out a situation, where data are sent not only directly to a recipient carrying out the necessary medical treatment but also to an intermediary who can be deemed to sincerely act in the vital interest of the data subject such as a person or responsible for the organisational part of the medical treatment.