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NOTE

From: German delegation
To: Working Group on Information Exchange and Data Protection (DAPIX)
Subject: Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)
- Horizontal issues

Germany refers to the JHA-Counsellor's breakfast on April, 14th and recalls the discussions and declarations at the JHA-Council meetings.

I. Chapter V

1. In regard to the partial general approach on Chapter V in June 2014 Germany refers inter alia to its statement for the minutes and suggests the following amendments to recital 78 and Article 41 paragraph (2) lit. (c) based on the document 10349/14 (amendments in **bold** and *italic*) and to its proposal for Article 42a:

Article 41

Transfers with an adequacy decision

[...]

2. When assessing the adequacy of the level of protection, the Commission shall, in particular, take account of the following elements:

[...]

(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 in relation to the protection of personal data. ***International commitments must contain guarantees to be given by the third country that ensure an appropriate level of protection in particular when data are processed in one or several specific sectors. In particular, the third country must ensure effective data protection supervision by adequately involving European data protection supervisory authorities, and the data subjects must be provided with possibilities of effective legal redress.***

Reasoning:

The US is Europe's most important trade partner. With this in mind, Germany emphasizes the importance of Commission Decision 2000/520/EC of 26 July 2000 on the adequacy of the protection provided by the Safe Harbor privacy principles and related frequently asked questions issued by the US Department of Commerce. Germany believes that there is an urgent need to improve this Decision. The Commission is therefore negotiating with the US. However, these negotiations have not yet been concluded. At the same time, legal proceedings which could also affect the Safe Harbor decision are currently pending before the European Court of Justice ((C-362/14 (Schrems)). On the basis of these developments, Germany is committed to ensuring that the General Data Protection Regulation contains criteria that the Commission should take into account when deciding on the adequacy of international commitments.

Article 42a

Disclosures not authorized by Union law

- 1. No judgment of a court or tribunal and no decision of an administrative authority of a third country requiring a non-public controller or processor to disclose personal data shall be recognized or be enforceable in any manner, unless this is provided for by a mutual assistance treaty or an international agreement between the requesting third country and the Union or a Member State or other legal provisions at national or Union level.*
- 2. Where a judgment of a court or tribunal or a decision of an administrative authority of a third country requests a non-public controller or processor to disclose personal data, the controller or processor and, if any, the controller's representative, shall notify the supervisory authority of the request without undue delay and must obtain prior authorisation for the transfer by the supervisory authority in accordance with point (i) of Article 44 (1).*
- 3. The supervisory authority shall inform the competent national authority of the request. The controller or processor shall also inform the data subject of the request and of the authorisation by the supervisory authority.*
- 4. Paragraphs (2) and (3) shall not apply to the disclosure of personal data for the purpose of investigation, detection or prosecution of criminal offences or the execution of criminal penalties.*

II. Chapter IV

In regard to the partial general approach on Chapter IV in October 2014 Germany reserves the right to return to the requirement for the mandatory appointment of a data protection officer for specific processing situations, due to its central importance in concluding discussions on the text.

III. Chapter IX

In regard to the partial general approach on Chapter IX in December 2014 Germany refers inter alia to its statement for the minutes referring to Article 82 based on document 16140/14:

Article 82

1. Member States may by law [...] provide for more specific *or stricter* rules for the protection of the employee [...]

The protection of employees' data is a fundamental and indispensable component of labour law. Labour regulations are seen as a special and protective right for the benefit of the employee as the weaker contractual partner and are consequently interpreted by the case law of labour tribunals. European labour law therefore generally lays down only minimum standards for the Member States to use as a framework. This means that a minimum level of protection by Member States established by European law may not be undercut, but at the same time the Member States are not prevented from prescribing a higher degree of protection for employees. In order to preserve this system of European labour law within the General Data Protection Regulation for the protection of employees' data as a component of labour law, Germany is in favour of opening up the possibility in Article 82 for the Member States to maintain or to create a level of protection of employees' data exceeding the level set out in the Regulation (paragraph 1: "Member States may by law provide for more specific **or stricter** rules for the protection of the employee ..."). In this way it can be guaranteed that the standards of the Regulation also apply in the context of employment and that the Member States can grant employees increased protection - as is otherwise customary in European labour law."

IV. Chapter II and Chapter VI

In regard with the partial general approach on Chapter II and Chapter VI of the proposal for the General Data Regulation in the version of Council docs. 6833/15, 6833/15 COR 3, 6834/15 and 6834/15 COR 1 Germany refers inter alia to its statement for the minutes:

Germany expressly supports the intent to conclude the negotiations under the Latvian Presidency and is thus in favour of the partial general approach to chapters II, VI and VII under the conditions listed in no. 3 of the documents, irrespective of the still-unresolved issues listed below.

Germany agrees to a general approach to Chapter II on the understanding that the questions referred to in Article 5 and 6 are central, cross-cutting issues which must be addressed again in the final discussions at Council level in line with the general reservation and without a predetermined outcome. Here, Germany believes it is important that these provisions maintain the current level of protection despite the changes made and the preservation of economic liberties. As a result, we believe further clarification is needed with regard to these important points.

In Article 5 (1) (b) and Article 6 (2), Chapter II contains rules on processing in the privileged areas (archival purposes in the public interest or scientific, statistical or historical purposes). Processing for these purposes is given priority over the rights of data subjects without exception and without weighing up interests in the individual case. Germany refers to the unresolved question of how to reconcile this absolute privileging with the rights of the data subject, in particular the fundamental right to respect for private and family life (Article 7 of the EU Charter of Fundamental Rights) and the fundamental right to the protection of personal data (Article 16 (1) TFEU, Article 8 of the EU Charter of Fundamental Rights). It should be noted that data processing for scientific, statistical or historical purposes may also be carried out by private bodies. For this reason, Germany believes it is necessary to limit the privilege granted by Article 5 (1) (b).

Despite repeated discussion, the Council was unable to agree on a common understanding with regard to the principle of purpose limitation, in particular in the case of processing for further purposes compatible with the original purpose for which the data were collected. But this is a central point of the entire Regulation. As a result, Germany believes it is still necessary to conclusively define

- the conditions under which further processing is compatible with the original purpose, and
- whether further processing for a purpose compatible with the collection requires a separate legal basis.

Germany is in favour of basing the Regulation on a clearly defined understanding of compatibility. Germany has therefore repeatedly proposed deleting Article 6 (3a) and instead wording its content more specifically in a recital.

Lastly, Germany again asks for support for re-introducing Article 6 (1) (f), second sentence. The Regulation must make clear that the balancing clause in Article 6 (1) (f) cannot be used in the public sector as a legal basis; an equally clear provision is also needed for Article 6 (4), second sentence. In this context, Germany recalls the compromise reached in the Council on the leeway the General Data Protection Regulation is supposed to allow the Member States according to Article 1 (2a) and Article 6 (3) to create a legal basis for data processing in the public sector which will define the conditions for intervention more precisely and specifically.

Re Chapter VI

Germany points out that it is not advisable to exercise all the powers of supervisory authorities listed in Article 53 vis-à-vis public bodies which in principle are subject to expert or legal supervision as well as judicial supervision.