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NOTE

From:	Austrian 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) - Proposals regarding Chapter V

Austria would like to thank the Greek Presidency and the Secretariat for their hard work on Chapter V. So far, however, a set of issues has remained unresolved. In addition to some points of fundamental importance, Austria wishes to draw the delegations' attention to some points of a more technical nature, too. Among the issues raised by the concrete proposals below, one may find also some of primarily symbolic value. Nevertheless, in particular with a view to the need to reach an agreement with the European Parliament, such points should not be underestimated.

Detailed remarks on Chapter V

Recital 79

Analysis:

The main purpose of the first sentence of this recital seems firstly to point to the need to take into account within this context agreements governing transborder flows of personal data as the latter are legal sources of a rank above the level of the regulation and, secondly to remind to the fact that agreements of such sort have to offer an appropriate level of protection of the rights of the data subjects simply due to the EU Charter of Fundamental Rights.

Notably in the light of the judgment of the court of justice in the data retention case (C-293/12, C-594/12) (keyword: obligation to sufficiently circumscribe any interference) it has to be stressed that the principles and safeguards laid down in the regulation and in particular those in Chapter V just are further specifying the principles contained notably in Article 8 of the Union's Charter of Fundamental Rights. Thus, any agreement concluded either by the EU or by Member States exercising their powers have, in principle, to take full account of the requirements set out by the regulation in order not to undermine the overall system of EU data protection.

Austria therefore proposes the following wording:

79) This Regulation is without prejudice to international agreements concluded between the Union and third countries or international regulating the transfer of personal data ~~including appropriate safeguards for the data subjects.~~ **However, given the fact, that the provisions of this regulation largely are to be seen as further specification of the principles contained notably in Article 8 of the Union's Charter of Fundamental Rights, such agreements, shall aim at ensuring a level of protection for the data subjects equivalent to this regulation.**
The same applies to international agreements involving the transfer of personal data to third countries or international organisations concluded by Member States within the limits of their competence.

Recital 80

Analysis:

Given that the general level of data protection in a third country or territory as such fails to stand the adequacy test, it is rather unlikely that at the same time single sectors of the said country or territories are able to provide evidence of compliance with the requirements for an adequacy decision. In principle, **considerable deviations** in the level of data protection **from one sector to another can only be plausibly and traceably described by key differences in binding legislation applicable to a specific sector.**

In this perspective, Austria proposes the inclusion of the following sentence:

80) The Commission may (…) decide with effect for the entire Union that certain third countries, or a territory or a **specified** sector, such as the private sector or one or more specific economic sectors within a third country, **due to particular sector-wide legally binding requirements**, 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

Recital 83

See remarks on Art 42 para 2a subpara d.

Recital 86

See remarks on Art 44 para 1 subpara a.

Recital 88

See also remarks on Art 44 para 1 subpara h.

Recital 91

The insertion outside the Union indicates, that the entire recital is exclusively focussing on the subject of data flows across the external Union border. In contrast, and which can be established by the content provided this is not the intention of the original commission proposal. Therefore, the passage should be deleted.

Article 4

para. 17 – binding corporate rules

Question: it seems to derive from the current wording, that the BCR are **exclusively** applied and adhered to **on the territory of a Member State,** but not in a third country!? Should this really be the intention of BCRs in the meaning of Art 42?

para. 21 – international organisations

Analysis:

The above definition may be in line with like definitions in EU instruments, however does not fully reflect the particularities of public international law. The **emphasis** here must not be on the relation between countries but on the **specific legal nature** of the instruments.

Therefore Austria proposes the following wording:

(21) '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 **under international law** between two or more subjects **of international law** (i.e. countries and **international organisations**);

Article 40 (in conjunction with recital 78)

Analysis:

In contrast to the argumentation of some Member States Article 40 provides for an added value insofar as it makes clear, that compliance with chapter V, notably when having recourse to the requirements of Article 44 para 1 subpara a to h **does not itself** provide for sufficient legal ground to transfer personal data to a third country. A general legal basis according to Art 6, however, is always needed in addition.

Conclusion:

Therefore, article 40 should be re-inserted in the text of the regulation. It would be inconsistent to mention this idea in a recital (78) only.

Article 41 para 1

Analysis:

In pursuance of the argumentation developed within the context of recital 80 (see above) particular reference should be made to the **prerequisite** (basic condition) for the adoption of an adequacy decision covering only a specific sector within a third country. Put another way, the particularity of this sector in terms of the level of data protection has to result from sector-wide binding requirements in place.

Therefore Austria proposes the following wording of para 1:

1. A transfer of personal data to (….) a third country or an international organisation may take place where the Commission has decided that the third country, or a territory or one or more specified sectors within that third country, **due to particular sector-wide legally binding requirements**, or the international organisation in question ensures an adequate level of protection. Such transfer shall not require any specific authorisation.

Article 41 para 2 subpara a

Analysis:

As it flows from in particular from the first subparagraph of Article 41 para 1 any adequacy decision should be based on a comprehensive view of the situation in the third country at issue. In order to highlight this approach from the very start, it deems appropriate to include this idea already in the chapeaux of the text. Art 25 para 2 of the current directive 95/46/EC already provides a wording.

Furthermore, bearing in mind the facts revealed by Edward Snowden it does by no means appear productive to delete specific criteria contained in the original Commission proposal such as "concerning public security, defense, national security and criminal law". Austria urges therefore to re-insert these elements. This is especially necessary because of the fact that both the texts of the Commission as well as the text of the European Parliament have this provision included.

Besides, in the logic of language the current wording of the Presidency text with regard to the passage "(…) as well as the existence of effective and enforceable data subject rights **and** effective administrative and judicial redress (…) is to be considered problematic: it does not reflect, that the latter (effective … redress) represent specifications of the former (enforceable rights) and therefore should not be related by using the word "and".

Therefore Austria proposes the following wording for Art. 41 para 2:

2. When assessing the adequacy of the level of protection, the Commission shall, ~~in particular,~~ take account ~~of the~~ […] **all the circumstances surrounding data transfer operations; particular consideration shall be given to** following elements:

a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation in force, both general and sectoral, including data protection rules and security measures**,** including rules for onward transfer of personal data to another third country or international organisation, which are complied with in that country or by that international organisation, as well as legislation **concerning public security, defence, national security and criminal law and its implementation,** jurisprudential precedents, **and in particular** the existence of effective and enforceable data subjects rights, effective administrative and judicial redress for data subjects, **in particular for those data subjects residing in the Union,** whose personal data are being transferred.

Article 41 para 2 subpara c

Analysis:

Here, the emphasis should lay on legally binding instruments, notably in the field of data protection. Like the European Parliament Austria therefore supports the inclusion of a respective reference and – just to give an example – an express reference to the Council of Europe Convention No 108.

Therefore Austria proposes the following wording:

c) the international commitments the third country or international organisation concerned has entered into, **including specific** obligations arising from its participation in multilateral or regional systems **and** in particular any **legally binding conventions or instruments** in relation to the protection of personal data **such as the council of Europe convention No 108 and its supplementary protocols.**

Article 41 para 2a

Austria strongly supports the idea of involving the European Data Protection Board. However, it is of the view that the consultation of the European Data Protection Board should be mandatory, in order to ensure that recourse is generally made to the experience and expertise of the latter. To this end, we support the relating Proposal of the European Parliament (Art 41 para 6a).

6a. Prior to adopting a decision based on Article 41 para 1, the **Commission shall request the European Data Protection Board** to provide an opinion on the adequacy of the level of protection. To that end, the Commission shall provide the European Data Protection Board with all necessary documentation, including correspondence with the government of the third country, territory or processing sector within that third country or the international organisation.

Article 41 para 3

Analysis:

As the case of the so-called Safe Harbour has shown, arrangements of indefinite duration within this specific context may result in low motivation on the part of controllers and processors to adhere to the relevant data protection provisions. The same seems to apply to governmental bodies with a view to the exercise of their supervisory functions. Thus Austria very much welcomes the idea of the European Parliament to generally limit the duration of adequacy decisions concerning specific sectors.

Moreover, the underlying idea should be applied to any sort of adequacy decision concerning countries or international organisations which did not enter into a legally binding international obligation with a view to ensuring an adequate level of data protection. This could motivate the addressees concerned to maintain and further develop a high standard of protection and in particular to enter into relevant international commitments such as the ratification of the Council of Europe Convention No 108 and its supplementary protocols.

Therefore Austria proposes the following additional sentence which is a proposal by the Parliament at the end of para 3:

3 […] **Decisions concerning a processing sector shall [may] provide for a sunset clause and shall be revoked** [according to para 5] **as soon as an adequate level of protection according to this Regulation is no longer ensured. The maximum duration of such decisions shall be 5 years. The same applies to decisions concerning third countries or international organisations not being bound by legally binding instruments of international law providing for an adequate level of data protection.**

Article 41 para 3a

Analysis:

Given the fact, that this regulation provides for a higher standard of protection compared to the current directive 95/46/EC, any indefinite and unconditional application of adequacy decisions based on the latter would in the long term perspective undermine the level of protection envisaged by the regulation. It is therefore vital to expressly limit the maintenance of the said decisions. Austria therefore supports the respective amendment of the European Parliament.

Art 41 para 3a should be replaced by para 8 of Art 41 in the version of Amendment 137 of the European Parliament:

8. Decisions adopted by the Commission on the basis of Article 25(6) or Article 26(4) of Directive 95/46/EC shall remain in force until five years after the entry into force of this Regulation unless amended, replaced or repealed by the Commission before the end of this period.

Article 41 para 5

Analysis:

As already mentioned in past DAPIX meetings, Austria refuses the alteration of para 5 of Art 41 to the effect, that the Commission should no longer be in the position to take a "non adequacy decision" independently from any previous adequacy decision.

The Ukraine crisis sets an example for the need of potential immediate reaction in the field of international transfer of personal data. There, a situation has arrived, where public order suddenly broke down in a part of the country which creates huge insecurity both with a view to the public and private sector. Allowing **quick response** in such a case requires the competence of the Commission or of supervisory authorities in the Member States for example to (temporarily) prohibit or restrict the transfer of personal data or categories of personal data to the territory concerned.

For this reason, Austria can support the relevant amendment proposed by the European Parliament:

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 to decide that a third country, or a territory or a processing sector within that third country, or an international organisation does not ensure or no longer ensures an adequate level of protection within the meaning of paragraph 2 of this Article, in particular in cases where the relevant legislation, both general and sectoral, in force in the third country or international organisation, does not guarantee effective and enforceable rights including effective administrative and judicial redress for data subjects, in particular for those data subjects residing in the Union whose personal data are being transferred.

Article 41 para 7

Austria would like to point to the following useful proposal of the European Parliament, which it can support and which DAPIX should consider to take on board:

7. The Commission shall publish in the Official Journal of the European Union **and on its website** a list of those third countries, territories and processing sectors within a third country and international organisations where it has decided that an adequate level of protection is or is not ensured.

Article 42 para 1

General remark on the concept of Art 42:

Even though appropriate safeguards in the meaning of Art 42 para 1 are available, a specific situation may occur (keyword: political crisis, civil war etc), in which a transfer of personal data could turn out extremely harmful from the data subjects point of view, notably with a view to adverse implications to his/her fundamental rights. Thus, it deems necessary to highlight, that the concept of responsibility obliges the controller, before starting a transfer of personal data based on Art 42, to sufficiently pay attention to **all relevant circumstances** surrounding the transfer.

Consequently a sentence in Art 42 para 1 should be added, which expressly states a respective obligation similar to that proposed above within the context of Art 41 para 1.

Therefore Austria proposes the following additional sentence at the end of para 1:

1. […] A controller or processor, before and during the carrying out of processing operations within the context of the transfer of personal data based on this provision shall take into account all the circumstances surrounding the transfer, in particular the risks for the respect of human rights and fundamental freedoms of the data subject. If the assessment of the said risks by the controller or processor should indicate a high degree of risk he/they should consult the supervisory authority according to Art 34.

Article 42 para 2a subpara b

It is clear, that codes of conduct, even when officially "approved" by a supervisory authority itself can neither produce legally binding effects nor provide for enforceable rights for data subjects. It would therefore not be plausible, within the context of Art 42, to consider such codes as appropriate safeguards. This would jeopardize the overall logic of Art 41 pp. The same applies mutatis mutandis to approved certification mechanisms. The mere existence thereof does not ensure any compliance or enforceability.

Austria therefore highly appreciates the Presidency attempts to resolve the matter.

Austria could accept the proposed text on condition, that there is a broad consensus within the Union that any "binding and enforceable commitment" in the meaning of Art 42 para 2 subpara d or e has in the final analysis to **consist of a contractual obligation entered by the controller, processor or recipient in the respective third country.** And this should be expressed in the recitals.

Article 42 para 2a subpara d and Recital 83

Firstly Austria does not yet fully understand the **effect of the new insertion** of the passage "including in a legally binding instrument" in Art 42 para 1 on para 2a subpara d of Art 42. The question arises, whether the said new element in Art 42 para 1 **would imply** that **any administrative arrangement** in the meaning of Art 42 para 3a subpara d **shall produce legally binding effects?** If so, it remains unclear by what means such effect could be ensured.

In the event, that the insertion cited above **should not be intended** to require any binding effect of administrative arrangements, further questions are to be addressed.

For instance, it would be a striking asymmetry to require binding obligations throughout the private sector whilst leaving it up to public authorities just to rely on nonbinding instruments such as administrative arrangements.

In addition, it remains unclear, whether such an understanding would be in conformity with the requirement of Art 8 para 2 of the EU Charter of Fundamental Rights (FRC). The latter states, that uch [personal data] must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other **legitimate basis laid down by law.** Notably in the light of the judgment of the court of justice in the data retention case (C-293/12, C-594/12) (keyword: obligation to sufficiently circumscribe any interference) it might by doubtful whether a nonbinding instrument, just being referred to by domestic law would constitute a sufficient legal basis pursuant to Art 8 para 2 of the FRC.

Similar questions would appear within the context of Art 8 para 2 EHRC (arg: "in accordance with the law" as understood by the EHRC). As any transfer of personal data by a public authority constitutes an inference with the rights of the data subjects provided by Art 8 para 1 EHRC, it has to be based on the law. And such law, according to the jurisdiction of the EHRC, has to be mandatory.

It flows from the considerations above, that further clarification in this regard is needed. The same applies to the last sentence of recital 83.

Article 42 para 5b

Our concerns within the context of Article 41 para 3a likewise apply to this provision. Therefore, Austria strongly supports the relevant amendment of the European Parliament.

Art 42 para 5 of Amendment 138 of the Parliament should be included:

5b .Authorisations by a supervisory authority on the basis of Article 26(2) of Directive 95/46/EC shall remain valid until two years after the entry into force of this Regulation unless amended, replaced or repealed by that supervisory authority before the end of this period.

NEW Article 43a

Austria would like to point to the Parliaments proposal for a so-called Anti-Fisa-Clause which seems to be useful and can in principle be supported:

Art. 43a
Transfers or disclosures not authorised by Union law

1. No judgment of a court or tribunal and no decision of an administrative authority of a third country requiring a controller or processor to disclose personal data shall be recognized or be enforceable in any manner, without prejudice to a mutual legal assistance treaty or an international agreement in force between the requesting third country and the Union or a Member State.

2. Where a judgment of a court or tribunal or a decision of an administrative authority of a third country requests a 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 or disclosure by the supervisory authority.

3. The supervisory authority shall assess the compliance of the requested disclosure with the Regulation and in particular whether the disclosure is necessary and legally required in accordance with points (d) and (e) of Article 44(1) and Article 44(5). Where data subjects from other Member States are affected, the supervisory authority shall apply the consistency mechanism referred to in Article 57.

4. The supervisory authority shall inform the competent national authority of the request. Without prejudice to Article 21, the controller or processor shall also inform the data subjects of the request and of the authorisation by the supervisory authority and where applicable inform the data subject whether personal data was provided to public authorities during the last consecutive 12-month period, pursuant to point (ha) of Article 14(1).

Article 44 para 1 subpara in connexion with Recital 86

The insertion of the term "explicit" does not seem appropriate within this context and should therefore be deleted. The emphasise should always lay on the unambiguousness and not on the issue of express or implicit expression.

Article 44 para 1 subpara h and Recital 88

This provision cannot be accepted out of reasons as stated many times on previous meetings. In particular, is to be pointed to the fact, that vague criteria such as "large scale" or "not frequent" which in isolation cannot justify any privileged conditions for the processing of data, create significant problems. Austria holds the view that due to its vagueness this exception clause runs the risk of becoming the "general rule". Moreover, so far, not any convincing example has been presented by other delegations proving the practical value of this subpara. Besides within this context recital 88 should be deleted, too.