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NOTE

From: Austrian delegation

To: JHA Counsellors/Coreper

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15544/14 DATAPROTECT 166 JAI 875 MI 887 DRS 150 DAPIX 170
FREMP 204 COMIX 612 CODEC 2253

Subject: Austrian Proposals for amendment regarding Chapters I, II and IX and
related recitals

The Austrian delegation, following on from its arguments presented in recent DAPIX meetings and in particular in Council document 14784/14 and maintaining its respective proposals unless modified below would like to make the proposals set out in the Annex.

As to Council doc. 15389/14

Proposal for additional wording in recital 38

The second sentence of this recital should read as follows:

“These two factual elements 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.”

Justification:

By the proposed insertion it would become more clear that a controller must not just or first and foremost rely on his/her assumed “legitimate interest”, but has to determine which interests of the data subject concerned are potentially affected and to consider in each case whether or not they outweigh his/her own interests.

Proposal for wording in recital 39

The last sentence of the recital with the reference to direct marketing should be deleted.

Justification:

The statement as such is too broad and does not differentiate. Especially in this context the principle of transparency (Article 5) is not sufficiently taken into account as well as the applied concrete working method.

Proposal for additional wording in recital 125

The following sentence should be included after the third sentence:

“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.”

Justification:

By the proposed insertion it should be highlighted that only processing of personal data for the said purposes not aiming at results related to specific individuals should be privileged under Article 5 para 1 subpara b (“compatibility”).

Proposal for an additional provision in Chapter IX enabling data protection laws for specific situations in the private sector in conjunction with a new recital corresponding thereto

In the case that Article 1 para 2a stays the way as it is in Doc. 15389/14 we would propose a new Article in Chapter IX. Although we are open for other possible solutions to reach this goal.

“Article 82b

Other data processing situations requiring specific protection of individuals

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.”

The last phrase of recital 35a should read as follows:

“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.”

Justification:

After the established case law of the European Humans Rights Court on Article 8 of the European Human Rights Convention (ECHR) Member States are – beyond their obligation to provide for a sufficiently determined legal basis for the processing of personal data by public authorities or bodies when performing tasks carried out in the public interest or in the exercise of public authority – also called upon 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.

According to Article 3 para 3 of the Charter of Fundamental Rights of the European Union (CFR) the meaning and scope of rights contained therein and corresponding to rights guaranteed by the ECHR shall be the same as those laid down by the latter Convention. Thus, the above cited jurisdiction of the European Humans Rights Court is fully relevant for the interpretation of Article 8 of the CFR as well and has to be reflected accordingly within the context of drafting the Regulation at issue.

Unfortunately, neither the current wording of Article 1 para 2a as such nor that of Article 6 take sufficiently account of the Member States' obligation resulting from Article 8 CFR in conjunction with the case law on Article 8 ECHR. The insertion "for compliance with a legal obligation or [...]" in para 2a of Article 1 e.g. is to be read together with Article 6 para 1 subpara c of the proposal. As the latter provision is obviously focusing on an obligation *to process* personal data it cannot serve as a basis for any provisions adopted by Member States in the interest of *restricting* such processing. Therefore it is necessary to expressly authorize Member States to adopt laws with a view to provide them with some room for the maintenance or introduction of legislation aiming at specifying the Regulation in order to meet needs of protection of individuals which they also deserve within the context of particular procession operations carried out for private purposes. Without such a clarification Member States currently providing e.g. for the protection of individuals against disproportionate use of monitoring technologies adversely affecting their rights and freedoms would run the risk of infringing against Article 1 para 2a in conjunction with Article 6.
