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To: Working Group on Information Exchange and Data Protection (DAPIX)

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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)

- Relationship Chapters II and IX

Background

1. When the Council at its meeting on 12-13 March 2015 reached a partial general approach, several delegations emphasised the need to revisit the relationship between Chapter III, which sets out the general data protection principles, and Article 83 in Chapter IX, which relates to specific data processing regimes, on which a partial general approach was reached in December 2014. This note attempts to address the main problematic issues surrounding this relationship and suggests possible avenues for solutions.

2. Article 83 sets out a derogatory regime for certain forms of processing, which are thereby to a certain extent "privileged" in the sense that Member States may provide for derogations for a number of data subject rights. These exemptions apply regardless of whether these forms of processing are initial processing or further processing of data initially collected for a different purpose¹. In addition these forms of processing are exempted from some of the general principles of Chapter II. Especially the purpose limitation, but also the requirement of a legal basis for processing are central to this debate. The debate on the relationship between the general principles of Chapter II and the specific "Article 83-forms of processing" can be broken down to different data protection principles, but in each case two questions can be distinguished, namely (i) whether the specific processing regime justifies such derogation and (ii) whether it should be qualified somehow. The importance of debate is increased by the fact that some of the specific processing regimes in Article 83 may imply processing of special categories of data in the sense of Article 9.

Purpose limitation and further processing

Purpose limitation and further processing in Chapter II

3. The 1995 Data Protection Directive already enshrined the purpose limitation principle and required that personal data be "not further processed in a way incompatible with those purposes". It also added that "[f]urther processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards". Thereby it enabled Member States to provide for presumption under their national law that further processing of personal data for historical, statistical or scientific purposes will be compatible with the initial purpose for which these data were collected.

4. This purpose limitation and the presumption of compatibility of further processing for historical, statistical or scientific purposes is taken over in almost identical terms in Article 5(1)(b) of the draft Regulation, albeit that processing for archiving purposes (in the public interest) has been added. When Chapter IX was discussed, it was decided to qualify the derogatory regime provided by Article 83 for archiving purposes by a public interest filter. Some delegations proposed to limit the exemptions for other forms of "Article 83 processing" by a public interest filter as well, but these proposals did not muster majority at that time.

¹ Processing of personal data for archiving and historical purposes will, however, due to its nature almost invariably constitute a form of further processing.

5. There are, however, *two important novelties* in the Regulation in this regard. The first one was proposed by the Commission in Article 6(4), which explicitly requires that further processing for an incompatible purpose (i.e. incompatible with the purpose for which the data were initially collected) should have a separate legal basis. Contrary to the initial Commission proposal, which explicitly aimed to exclude this, the text submitted to the Council in March allows the "legitimate interest" of the controllers as separate legal basis for further processing for incompatible purposes, by the same controller. The redrafted recital 40, now clarifies that processing for further purposes requires a separate legal basis only in cases where these further purposes are incompatible with the initial purposes and that further processing for compatible purposes can take place on the ground of the legal ground on which the processing for the initial purposes was based. The question of whether the rules on further processing apply only to the same controller or also to the subsequent controllers that further process personal data initially collected by another controller has been fiercely debated among Member States and there is clearly no consensual view on it.

6. A second novelty as compared to the 1995 Directive, which was introduced during the negotiations in the Council, is paragraph 3a of Article 6 which provides a non-exhaustive list of criteria for ascertaining whether a new processing purpose is compatible with the initial purpose.

Further processing and Article 83

7. Past discussions have shown there to be a fair amount of confusion surrounding the issue of further processing and its relationship to Article 83. Apart from the presumption of compatibility laid down in Article 5(1)(b), Article 6(2) also states that "[p]rocessing 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". Read together, these two provisions from Chapter II imply that further processing for one of the "Article 83 purposes" of data initially collected for a different purpose does not require a separate legal basis and is deemed compatible with the initial purpose. Some delegations are of the opinion that in this way further processing for "Article 83-purposes" is over-privileged and needs to be re-assessed in order to avoid a possible lowering of the data protection level.

Broad consent and (further) processing for other scientific purposes

8. One of the legal grounds for processing is consent by the data subject. Recital 25 clarifies that consent should cover all processing activities carried out for the same purpose or purposes. It has been added that where processing has multiple purposes, unambiguous consent should be granted for all of the processing purposes. As set out in Article 4(8), consent must be freely-given, informed and specific in the sense that the data subjects must know that they are consenting and for what purpose they are consenting. However, as regards processing for scientific purposes it is often not possible to fully identify the purpose of data processing for scientific purposes at the time of data collection. Therefore, recital 25 has been drafted in such a way to emphasise that data subjects can give their consent to certain areas of scientific research when keeping with recognised ethical standards for scientific research. However, recital 25 also clearly states that 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".

9. This recital clearly acknowledges that scientific processing may in itself imply processing for different purposes. Therefore, even when scientific processing is the initial purpose of the processing, the question as to the compatibility of further processing with the initial purposes may arise.

Questions

10. *In view of the above, delegations are invited to debate the below questions:*

1. *Should the question of further processing be regulated in Chapter II in a more detailed manner than in 1995 Directive?*
2. *If so, should this include*
 - a) *criteria for determining what are compatible purposes;*
 - b) *rules on which legal basis can be relied upon in case of further processing; or*
 - c) *both of them?*
3. *In case the Regulation sets out the legal bases that can be relied upon for further processing, whether this should apply to:*
 - a) *the same controller, or*
 - b) *the same controller as well as to a different controller?*

4. *Should the presumption of compatibility of further processing for "Article 83 purposes" be further limited than is currently the case? If so, should this be done by:*
- a) *stipulating that the presumption only applies to further processing by the same controller;*
 - b) *stipulating that the presumption of compatibility applies only in case the initial processing falls within the same category of processing (e.g. one form of scientific processing presumed to be compatible with another form of processing);*
 - c) *applying the public interest filter to other forms of "Article 83 processing" than archiving; or*
 - d) *another method?*
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