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DRAFT MINUTES

Subject: **3376th** meeting of the Council of the European Union (**JUSTICE AND HOME AFFAIRS**) held in Brussels on 12 and 13 March 2015

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¹ Deliberations on Union legislative acts (Article 16(8) of the Treaty on European Union), other deliberations open to the public and public debates (Article 8 of the Council's Rules of Procedure).

LEGISLATIVE DELIBERATIONS

(Public deliberation in accordance with Article 16(8) of the Treaty on European Union)

"A" ITEMS

1. Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings [First reading] (LA)

– Adoption

a) of the Council's position at first reading

b) of the statement of the Council's reasons

6583/15 CODEC 253 JUSTCIV 36 EJUSTICE 16

16636/14 JUSTCIV 319 EJUSTICE 123 CODEC 2464

+ COR 1 (hr)

+ REV 1 (sv)

+ REV 2 (dk)

+ REV 3 (es)

+ REV 4 (pl)

+ ADD 1

approved by Coreper, Part 2, on 04.03.2015

The Council approved its position at first reading, pursuant to Article 294(5) of the Treaty on the Functioning of the European Union. In accordance with the relevant Protocols annexed to the Treaties, the Danish delegation did not participate in the vote. (Legal basis: Article 81 of the TFEU)

"B" ITEMS

3. Any other business

– **Information from the Presidency on current legislative proposals**

The Council took note of the information by the Presidency on the progress achieved and the envisaged further steps in relation to the legislative proposals concerning the proposal for the Student and Researchers Directive, the proposal amending the Dublin Regulation in relation to unaccompanied minors and the proposal for the CEPOL Regulation.

8. 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) [First reading]

– Partial general approach¹

6833/15 DATAPROTECT 26 JAI 156 MI 144 DRS 18 DAPIX 30 FREMP 45
COMIX 102 CODEC 295

+ COR 3

6834/15 DATAPROTECT 27 JAI 157 MI 145 DRS 19 DAPIX 31 FREMP 46
COMIX 103 CODEC 296

+ COR 1

+ COR 2

The Council held a lengthy and in-depth debate on the draft texts of Chapters II, VI and VII presented by the Presidency. During this debate the vast majority of delegations indicated its support for a partial general approach on these chapters on the following three conditions:

- i) nothing is agreed until everything is agreed and therefore the partial general approach does not exclude future changes to be made to the text of the provisionally agreed Articles to ensure the overall coherence of the Regulation;
- ii) the partial general approach is without prejudice to any horizontal question; and
- iii) the partial general approach does not mandate the Presidency to engage in informal trilogues with the European Parliament.

At the same time a number of delegations indicated concerns. These related in particular to, regarding Chapter II, the need of horizontal alignment to other parts of the Regulation, and, regarding the one-stop-shop mechanism, the need to ensure the effectiveness of the future European Data Protection Board by managing its workload. Germany and Austria made the statements set out below.

The President concluded that a partial general approach had been reached on the draft texts of Chapters II, VI and VII. The work would continue at technical level on the remaining parts of the Regulation on which no partial general approach had been reached yet as well as on a horizontal review of the entire Regulation with a view to streamlining the draft text. This should also allow to discuss the expediency of a review clause regarding the need for a mechanism to alleviate the load work of the future European Data Protection Board.

Statement by Germany

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 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."

Statement by Austria

"Austria is not in a position to endorse the current stage of negotiations as partial general approach on the provisions of the Chapter II since in our opinion the following issues – amongst others – remain unresolved:

On Art. 6 para 1 point f (“legitimate interest” as a basis for lawful processing)

Austria emphasizes that in our view the concept of “legitimate interest” as currently set out in Art. 6 para 1 point f of the Draft Regulation does not meet the requirement of effective protection of the rights and freedoms of the data subject as resulting from the European Union Charter of Fundamental Rights nor does it sufficiently reflect the needs of the fundamental principle of legal certainty.

In our view according to Art. 6 para 1 point f the interest of the controller does not need to override the interests of the data subject. Pursuant to the current wording processing of personal data can already be regarded as lawful when the controller refers to a “legitimate interest” equally important to that of the data subject. In such a case it could be up to the latter to demonstrate that in the particular case his or her right to data protection overrides the “legitimate interest” assumed by the controller. Such burden of proof on the side of the data subject cannot be considered as being in conformity with the fundamental nature of the right to data protection. The current wording of recital 38, 38a, 39 and 40 proves that such concerns are quite justified. This is particularly valid for the way “direct marketing” is treated in recital 39 which cannot be accepted.

Within this context Austria urges for modifications of Art. 6 para 1 point f with a view to introducing the requirement of clear prevalence of the legitimate interest(s) of the controller including his/her obligation to appropriately document this interest. For further details we are referring to our proposal as set out in Council doc. 6741/15 of 3 March 2015.

On Art. 6 para 2 and Art. 9 para 2 point i (“processing for archiving, historical, statistical or scientific purposes”)

In our view the Draft Regulation does not provide for any harmonisation in the field of archiving, statistical, historical or scientific purposes. This means that Art. 6 para 2 and Art 9 para 2 point i as such cannot be regarded as a sufficient legal basis for the processing of personal data. Therefore the Union law or Member State law has to determine the conditions on which personal data may be collected and processed lawfully within the general framework of the Regulation as well as the appropriate safeguards. Art. 83 of the Regulation however permits them to provide for derogations from certain Articles. In order to ensure a common understanding of Art. 6 para 2 as discussed above a corresponding recital should be inserted.

On Art. 6 para 3 and Art. 9 para 5 (“obligations resulting from Art. 8 CFR in conjunction with the established case law on Art. 8 ECHR”)

On this occasion Austria recalls the declaration to the minutes of the 3354th meeting of the Council with a view to the 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. For this purpose we are referring to the Austrian proposal for an Art. 82b (see doc. 15768/14) as well as to that for a respective subpara to Art. 6 para 3 and a corresponding recital 35a as set out in Council doc. 6741/15 of 3 March 2015.

On Art. 6 para 3a and 4 (“further processing”)

Austria highlights that the concept of “further processing” as currently referred to in Art. 5 para 1 point b, Art. 6 para 3a and 4 has to be considered as a particular subset of lawful processing deserving privileged treatment. Firstly because the “further processing purpose” is very close to the purpose for which the respective data have originally been collected (“compatible purpose”) and secondly as the processing is carried out by the same controller. Any “further processing” which does not fall under Art. 6 para 3a but has to be dealt with under the legal basis of points a to e of Art. 6 para 1.

Art. 6 para 1 point f however cannot be accepted as a legal basis for any further processing for incompatible purposes. This would create the serious risk of circumvention of the requirements set out in Art. 6 para 3a and the principle of purpose limitation. The last sentence of Art. 6 para 4 also conflicts with our view of Art. 6 para 1 point f. It is therefore of utmost importance to delete the second sentence of Art. 6 para 4 as set out in council doc. 6834/15 (+COR 1 and 2).

On Art. 8 (“Processing of personal data of a child”)

As for the issue of particular protection of children, Austria is of the opinion that Art. 8 should keep some regulatory significance in the meaning of ensuring some minimum harmonization throughout the Union. For this we are very much in favour of reinserting a concrete age threshold. Regarding the particular situation of granting authorization by the holder of parental responsibility over the child we hold 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, we object to the proposed insertion in recital 29 (second sentence) as no added value in view of the proper interpretation of Art. 8 can be detected and moreover, it could be misinterpreted insofar as if such methods of data collection are somehow to be regarded as “state of the art”.

In addition, it is striking that the particular protection provided by Art. 8 to children is limited to a situation where information society services are directly offered to a child. Austria cannot see any justification for such a narrow approach. Data collection from children can also take place within the context of non-digital media and the extended protection of children should be applicable also to such processing operations. Thus, we suggest deleting the text “in relation to the offering of information society services”.

On Art. 14 para 1 in conjunction with Art. 6 para 4 (“information of the data subject in case of further processing”)

As the recent discussions at several EU levels has shown the need for clarification with a view to establishing a clear obligation of the controller to inform the data subject whenever it comes to a further processing for a purpose not compatible with that for which the data have originally been collected for. Such obligation would increase the transparency of further processing and would enhance the exercise of the data subjects’ rights concerning further processing operations. For this reason, Austria suggests to make an insertion in Art. 14 para 1 as follows: „Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained or in case of further processing of personal data according to Article 6(4) before 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, provide the data subject with the following information: (...)”

On recital 23c (“pseudonymisation”)

Austria holds the view that the issue of “pseudonymisation” still gives rise to some concern. The concept of “pseudonymisation” has to be considered as one possible tool to improve data security. Thus, as long as pseudonymisation is applied within the business sphere of the same controller it never ever can justify any easing of other obligations set out in the Regulation. Any privilege is only acceptable 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. Therefore Austria urges the deletion of recital 23c which is absolutely misleading in view of the correct handling of the definition of “pseudonymisation” as provided in Art. 4 para 3b.

For the further comments on other issues and further details we are referring to our proposals made in Council doc. 6741/15 of 3 March 2015."

9. Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office

- Orientation debate
- State of play

6318/1/15 REV 1 EPPO 18 EUROJUST 48 CATS 33 FIN 126 COPEN 54 GAF 4

The Council noted

- that there is broad support for the basic principles of the model for transactions with the European Public Prosecutor's Office proposed by the Presidency, although some delegations have concerns regarding certain aspects of it;
- that the issue should be examined further at expert level with a view to finding a solution acceptable to all.

10. Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings [First reading]

– General approach

6603/15 DROIPEN 20 COPEN 62 CODEC 257

+ COR 1 (de)

The Council reached a general approach on this proposal set out in doc. 6603/15. Belgium, Bulgaria, France, Italy, Portugal, Spain and Lithuania made a statement, as set out below. The Netherlands lifted its parliamentary scrutiny reservation.

Statement by Belgium, Bulgaria, France, Italy, Portugal, Spain and Lithuania

"Belgium, Bulgaria, France, Italy, Portugal, Spain and Lithuania recall their commitment to ensure effectivity of the rights recognized by the directives which implement the roadmap on procedural rights in the framework of criminal proceedings.

They consider that the future directive on legal aid must enable all European citizens to enjoy a practical and effective exercise of the right of access to a lawyer, as enshrined in directive 2013/48/EU.

They regret that the general approach submitted to the Council of Ministers of Justice on 13th March 2015 for this draft directive, by narrowing down its scope through wide and discretionary derogations, does not allow to achieve this aim.

They do not, however, wish to oppose the adoption of this general approach, in order to allow the legislative process to go further, and continue to discuss with the European Parliament and the Commission in the context of the trilogues.

11. Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (EUROJUST) [First reading]

– General approach

6643/15 EUROJUST 59 EPPO 20 CATS 37 COPEN 67 CODEC 266 CSC 49

+ REV 1 (sl)

The Council reached a general approach on this proposal set out in doc. 6643/15. Austria made a statement, as set out hereafter.

Statement by Austria

"Austria interprets the provisions of the General Approach of the Eurojust-Regulation on the powers of the national member (Art 8 paras 1a, 2 and 3 and Recital 11a) along the lines of Art 85 TFEU, particularly para 2, which states: "In the prosecutions referred to in paragraph 1, and without prejudice to Article 86, formal acts of judicial procedure shall be carried out by the competent national officials", as follows:

The national member acts as a "competent national official" within the meaning of Art 85 para 2 TFEU when applying the powers provided for in Art 8 paras 1a, 2 and 3.

If one would interpret the provisions contrariwise, i.e. giving up the dual function of the national member, procedural acts of him/her would be regarded as acts of an agency within the meaning of Art 263 TFEU.

As a result, Austria considers that the dual function of the national member, which is currently regulated particularly in Art 9a para 1 of the Council Decision 2002/187/JHA of 28 February 2002, as amended by Council Decision 2009/426/JHA of 16 December 2008, is maintained in the General Approach of the Eurojust-Regulation."

12. Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [First reading]

- Partial general approach²
6812/15 JUSTCIV 40 FREMP 36 CODEC 283
+ ADD 1

The Council:

- a) approved the compromise package on the partial general approach set out in addendum to doc. 6812/15;
- b) called for the work on the remaining articles, including Article 18(2b), the recitals and the multilingual standard forms set out in the Annexes of the future Regulation to be finalised at technical level as soon as possible after the Council; and
- c) took note that further reflection will be done on whether a joint political declaration by the Council and the Commission on the issue of external competence is still needed and considers that the issue could be re-examined, if necessary, at its meeting of June 2015.

² When adopting a General approach after the European Parliament has adopted its position at first reading, the Council is not acting within the meaning of Article 294(4) and (5) TFEU.

13. Any other business

– **Information from the Presidency on current legislative proposals**

The Presidency informed the Council about the state of play of the negotiations on the draft Data Protection Directive.
