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NOTE

From:	Danish delegation
To:	Working Party on Information Exchange and Data Protection
Subject:	Flexibility for national legislation in the draft Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Directive 46/95 on the protection of individuals with regard to the processing of personal data and on the free movement of such data provides that Member States shall determine more precisely the conditions under which the processing of personal data is lawful (Article 5). Furthermore the recitals provide that there will be left a margin of manoeuvre for Member States therefore enabling Member States to specify in their national law the general conditions governing the lawfulness of data processing (recital 9). Moreover recital 22 clearly states that Member States – independently of general rules – can provide for special processing conditions for specific sectors and for the processing of special categories of data.

Denmark has utilized the margin of manoeuvre which the Directive provides for Member States. Therefore there are a number of areas of Danish national law that in some way prescribe rules on some aspects of processing of personal data.

In conjunction with the general and horizontal law on data protection implementing the 95-Directive¹, Denmark has several sector specific laws in areas that need a more detailed/precise/specific regulation. These national laws may provide for a stricter or a more lenient regulation of the processing of personal data. On the basis of the 95-Directive Denmark has special rules on data protection regarding e.g. processing of personal data in the health care sector, processing of personal data by credit reference bureaus, processing of data relating to a national identification number ect. It is important for Denmark that these sector specific laws can be upheld and that the possibility to introduce new sector specific laws is also upheld. It is therefore important for Denmark that the draft Regulation more clearly states that there is a margin of manoeuvre for Member States – and that there is flexibility for the national legislator to adopt national legislation on processing of personal data in specific sectors and for special categories of data.

Denmark recognizes that some margin of manoeuvre is already provided for in the draft Regulation. Denmark especially recognizes Article 6 (3), Article 9 (2) (a) and (g) and recital 36 which are crucial to this end and a good basis for further work. There is indeed the need for further clarification.

On this basis Denmark puts forward the following²:

(The proposals are based on the Presidency text in 17831/13. New text is marked in **bold**. Text to be deleted is ~~erossed~~.)

¹ Law no. 429 of 31 May 2000 (incl. subsequent changes)

² Only the relevant recitals and paragraphs are referenced.

35a) This Regulation provides for general rules on data protection. However Member States are also provided with a margin of manoeuvre to lay down national laws on data protection. The Regulation does therefore not exclude Member State law that defines the circumstances of specific processing situations, including determining more precisely the conditions under which processing of personal data is lawful. National law may also provide for special processing conditions for specific sectors and for the processing of special categories of data.

36) Where processing is carried out in compliance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority, the processing should have a (...) basis in Union law or in the national law of a Member State. (...). It should be also for Union or national law to determine the purpose of the processing. Furthermore, this (...) basis could, ~~within the limits of this Regulation,~~ **specify the general conditions governing the lawfulness of data processing**, determine specifications for determining the controller, the type of data which are subject to the processing, the data subjects concerned, the entities to which the data may be disclosed, the purpose limitations, the storage period and other measures to ensure lawful and fair processing. It should also be for Union or national law to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public authority or another natural or legal person governed by public law, or by private law such as a professional association, where grounds of public interest so justify including for health purposes, such as public health and social protection and the management of health care services.

- 41) Personal data which are, by their nature, particularly sensitive (...) in relation to fundamental rights and freedoms, deserve specific protection as the context of their processing may create important risks for the fundamental rights and freedoms. These data should also include personal data revealing racial or ethnic origin, whereby the use of the term ‘racial origin’ in this Regulation does not imply an acceptance by the European Union of theories which attempt to determine the existence of separate human races. Such data should not be processed, unless processing is allowed in specific cases set out in this Regulation. In addition to the specific requirements for such processing, the general principles and other rules of this Regulation should apply, in particular as regards the conditions for lawful processing. Derogations from the general prohibition for processing such special categories of personal data should be explicitly ~~be~~ provided for **and include** where the data subject gives his or her explicit consent or in respect of specific needs, in particular where the processing is carried out in the course of legitimate activities by certain associations or foundations the purpose of which is to permit the exercise of fundamental freedoms. **Member State and Union Law may provide that the general prohibition for processing such special categories of personal data in certain cases may not be lifted by the data subject’s explicit consent.**
- 42) Derogating from the prohibition on processing sensitive categories of data should also be allowed **when provided for in Member State** law, and subject to suitable safeguards, so as to protect personal data and other fundamental rights, where important grounds of public interest so justify and in particular for health purposes, including public health and social protection and the management of health-care services, especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system, or for historical, statistical and scientific (...) purposes. A derogation should also allow processing of such data where necessary for the establishment, exercise or defence of legal claims, regardless of whether in a judicial procedure or whether in an administrative or any out-of-court procedure.

Article 6

3. The basis for the processing referred to in points (c) and (e) of paragraph 1 must be provided for in:

(a) Union law, or

(b) national law of the Member State to which the controller is subject.

The purpose of the processing shall be determined in this legal basis or as regards the processing referred to in point (e) of paragraph 1, be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. ~~Within the limits of this Regulation,~~ **This legal basis may specify inter alia the general conditions governing the lawfulness of data processing,** the controller, processing operations and processing procedures, including measures to ensure lawful and fair processing, ~~may be specified in this legal basis.~~

Article 9

2. Paragraph 1 shall not apply if one of the following applies:

(a) the data subject has given explicit consent to the processing of those personal data, except where Union law or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject; or

(g) processing is necessary for the performance of a task carried out for important reasons of public interest, on the basis of Union law or Member State law which shall provide for suitable measures to safeguard the data subject's legitimate interests; or