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NOTE

From: The French Delegation

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

Subject: Note from the French authorities

- Mechanism for the certification of controllers and processors not established in the EU and wishing to benefit from data transfers from the European Union

Translation provided by the French Delegation

The French authorities wish to thank the Italian Presidency for its proposals, and in particular concerning the certification mechanisms laid down in Articles 39 and 39a.

In view of the discussions in DAPIX concerning these articles, the French delegation would like to recall its wish to include a new mechanism allowing for the transfer of personal data to controllers or processors exclusively established in third countries, relying on their voluntary involvement in the certification procedure.

These proposals reflect the request of the French authorities during the last JHA Council in June to introduce a so-called “reversed Safe Harbor” mechanism in the Regulation proposal (these proposals were formalised by means of a written declaration annexed to the minutes of the JHA Council).

This mechanism draws from the guiding principles of the Safe Harbour. Its goal is to allow companies without any establishment on the territory of the EU, and which are not subject to the Regulation in accordance with paragraph 2 of Article 3, to voluntarily respect the European principles and requirements in the field of data protection, in order to be able to benefit from data transfers from the Union. Compliance with these principles would also imply that such companies would voluntarily be subject to the control of the European supervisory authorities in this respect.

To sum up, the French proposals rely on the following main elements:

- Granting the accreditation of the certification bodies, which will need to have at least one establishment in the Union, to the European Data Protection Board (EDPB) on a proposal from the supervisory authorities. This proposal aims to guarantee a homogenous European approach and thus legal certainty for the certified companies. It also removes the risks of forum shopping.

- Granting the EDPB the obligation to establish and update a European list of the accredited bodies with the authority to grant certifications and of the certified companies. This publicity is an essential element in securing the transparency of the system and informing the controllers and processors, the supervisory authorities and the data subjects.

- Establishing common European rules to be respected by the accredited bodies wishing to obtain an accreditation which will allow them to certify companies in third countries.

- Establishing a common European framework of requirements that the certified controllers and processors in third countries will have to respect. This framework should be declined on several levels: the Regulation itself will in any case contain the principles which will have to be respected, while the EDPB will have to draw up the more detailed European framework, which will thus be more adaptable to technological developments and to actual practice.
- Allowing any supervisory authority to control the accredited bodies within the European Union and the certified companies wherever they are established outside the Union, with the possibility of linking complementary measures to the revocation of the accreditation (indication of the grounds of the revocation on the public list and/or a ban on re-accreditation during a certain period).
- Lastly, enabling the data subjects to lodge a complaint or to have access to judicial redress before their national supervisory authorities and courts when their rights have been infringed.

The draft proposals concerning this mechanism as well as some amendments about the articles relating to certification are currently being finalised. The French authorities will transmit them as soon as possible so that they can be examined in detail by the DAPIX working party.