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NOTE

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Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Decision 2009/917/JHA, as regards its alignment with Union rules on the protection of personal data – Compilation of written comments

Delegations will find attached a compilation of the Member States' comments regarding abovementioned proposal following the meeting of the LEWP (Customs) on 10 July 2023.

ANNEX

WRITTEN COMMENTS

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AUSTRIA

Article 1, Paragraph 2:

Paragraph 2 has always referred to the "*aim*" of the Customs Information System. This should now be replaced by the word "*objective*". In this regard, it should be noted that in the context of data processing the term "purpose" is used. Despite the fact that paragraph 2 of Article 1 deals with the objective of the entire processing system and not a specific processing operation, so that the term "purpose" does not necessarily have to be used, it should be at least put up for discussion, whether it would not be better to align the wording with the usual wording in data protection law and use the term "purpose" instead.

In the event of a change in the previously used term "*aim*" in Article 1(2), it must be ensured that all references to it are also consistently adjusted (e.g. Art 3(1) as amended contains the phrase "aim as stated in Article 1(2)". An adaptation of this provision corresponding to the new Article 1(2) is missing in the EC proposal.

It should be clarified whether and to what extent the reference to "*criminal offences under national laws*" (instead of the previous "serious contraventions of national laws") is associated with a change (extension?) of the purposes/aims/objectives of the CIS; this should be made clearer in the associated Recital 3.

Article 3, Paragraph 2:

While the Commission, as an EU institution, is subject to the data protection provisions of Regulation (EU) 2018/1725, the competent authorities of the Member States are subject to the implementation provisions of Directive (EU) 2016/680 – e.g. Article 20 as proposed. Parallel to the reference to the definition of processor in Regulation (EU) 2018/1725, a reference to the relevant definition of controller *("controllers within the meaning of point (8) of Article 3 of Directive (EU) 2016/680"*) should be also made in the newly added sentence in Article 3 paragraph 2.

Article 4, Paragraph 5:

To clarify what types of data are involved, the term ‘’*special categories of personal data’’* as referred in Article 10 of Directive (EU) 2016/680, can be used instead of listing all categories.

Article 5, Paragraph 2:

What are the impacts of changing the wording "*real indications*" to "*reasonable grounds*"? In any case, these should be explained in more details. In the detailed explanation of the provisions, there is only a vague explanation of updating paragraph 2 to "clarify" the conditions for collecting and recording personal data. No additional clarifications are given in the recitals.

Article 7, Paragraph 3:

1. The EU data protection legal framework fundamentally differentiates between data transfers within the EU – where data protection is fully guaranteed in Union law - and data transfers to third countries and international organisations - who are not themselves subject to EU data protection law. They are only permitted under certain conditions, which are listed in Chapter V of the applicable Union legal act on data protection.

   The concept of "*regional organisation*" does not exist in the EU data protection legal framework. However, since Article 7(3) apparently assigns the granting of access to the CIS for "*regional organisations*" under the regulatory regime of Chapter V of Directive (EU) 2016/680, it can be assumed that "*regional organisations*" are to be subsumed under the term "*international organisation*" as defined in Article 3(16) of Directive (EU) 2016/680. If this assumption is correct, it should be clarified in the text how the international and regional organisations are to be classified in terms of data protection law. For example a bracket reference like: *„ ...permit access to the Customs Information System by international or regional organisations (international organisations within the meaning of point (16) of Article 3 of Directive (EU) 2016/680)“* would be conceivable.

2. The proposal stated that the access to the CIS by international or regional organisations should be exceptional. In this regard, Austria shares the view of The European Data Protection Supervisor (Opinion 30/2023) to specify substantive criteria on the basis of which such exceptional access would be granted. Austria agrees with the recommendation of the EDPS enhancing Article 7(3) of the Council Decision by ensuring that access to CIS by international or regional organisations would only be possible if there are specific substantive conditions, defining especially the types of cooperation that could warrant such access, the types of international or regional organisations, the specific purposes that could justify granting of access, the types of personal data to be accessed, as well as technical and organisational safeguards applicable in that context. The authorisation to grant access to the CIS, regarding the potential circle of the organisations concerned, should also

be limited to what is necessary. In addition, it is unclear to what extent these organisations must be responsible for the prevention, investigation, detection and prosecution of the relevant crimes. Due to the fact that Article 7(3) (a) refers to Article 39 of Directive (EU) 2016/680, it can be assumed that there doesn't have to be any competence in this regard. In derogation of the principle enshrined in Article 35(1)(b) of the Directive (EU) 2016/680 according to which personal data may only be transferred to competent authorities for law enforcement in third countries or international organisations, Article 39 of Directive (EU) 2016/680 opens the opportunity to transfer personal data to recipients other than those competent authorities. In terms of data protection law, such transmissions in the criminal prosecution context are problematic, especially since they are ultimately a matter of bypassing regular legal assistance channels. Austria sees the possibility of allowing international or regional organisations, who do not have any law enforcement responsibilities, to have access to the CIS extremely critical because that would mean that potentially everyone may have an access. Therefore, **Austria expresses a scrutiny reservation on the reference to Article 39 of Directive (EU) 2016/680 in Article 7(3**).

Article 8, Paragraph 1:

Considering that Directive (EU) 2016/680 needs to be implemented, it is proposed to consider whether a reference should be made in the first subparagraph (concerning the processing of personal data) to the "*applicable provisions of Union law and the applicable law of the Member States*".

Article 8, Paragraph 4:

What has been said about Article 8(1) also applies to Article 8(4)(a).

Article 14:

Austria welcomes the setting of maximum storage periods for the data that are entered into CIS. However, **Austria expresses a scrutiny reservation regarding the maximum period of five years, as this would probably not be sufficient in practice.**

Article 20:

Although the field of application of Directive (EU) 2016/680 or its national transposition provisions is self-evident, the clarifying provision in Art. 20 seems appropriate. However, Article 20 should additionally refer to Regulation 2018/1725 because as far as data processing by EU institutions is concerned – it's provisions are also relevant (cf. Article 8 Abs. 4 lit. b und Article 26).

BELGIUM

Preliminary remarks:

- We use 'LED' for D. 2016/480 and 'EUDPR' for R. 2018/1725
- Consistency needed in the use of 'aim' and 'objective' (see article 1 (7) and article 1 (9))
- Consistency needed in the use of

Article 1 (2), deletion of the definition 'personal data': maybe a reference to the definition in LED would make things clearer, in spite of the proposed new text of article 20 of the Decision, which comes very much after the definitions, and which makes clear that also the definitions of LED apply.

Article 1 (3), which amends Article 3 (2) of the Decision, adds the following sentence (own marking):

> *'In relation to the processing of personal data in the Customs Information System, the Commission shall be regarded as the processor within the meaning of Article 3(12) of Regulation (EU) 2018/1725, acting on behalf of the national authorities designated by each Member State, which shall be regarded as the controllers of the personal data.'*

BE agrees with the division of the roles (MS controllers, COM processor) as such.

The legal base, though, cannot be as stated: if the national authorities are controllers and the Commission is processor, then EUDPR does not apply (at least for the relationship between Controllers and the processor).

First, see the definition of a controller in article 3 (8) of EUDPR, which states (own marking):

> *'controller' means the **Union** institution or body or the directorate-general or any other organizational entity which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by a specific Union act, the controller or the specific criteria for its nomination can be provided for by Union law*

Next, see the definition of a controller in article 3 (8) of LED, which states (own marking):

*'controller' means the **competent authority** which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;*

Also, competent authority is defined in article 3 (7) of LED:

'competent authority' means:

(a) any public authority competent for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; or

(b) *any other body or entity entrusted by Member State law to exercise public authority and public powers for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;'*

This means that, if the competent authorities of the MS are the controllers (as stated in the Proposal), EUDPR cannot be applicable to them (and their relation with the processor), since the competent authorities of the MS are no '*Union institution or body or the directorate-general or any other organizational entity*'.

The definition of Processor can be taken from either EUDPR or LED. The definition of Controller, in the case where the national authorities are the controllers as stated in the Proposal, can only be taken from LED. As a consequence, the legal basis for the agreement between the controllers (27 MS) and the processor (COM) can only be article 22.3 LED (and not art. 29.3 EUDPR). See also the remark on art. 1 (11), below.

As COM rightly pointed out during the meeting LEWP customs of 10 July 2023, this agreement is not necessary if the contents of the agreement is stipulated in a legal act ('*processing by a processor [is] governed by a contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller*'). However, if the amended CIS Decision is to replace the agreement, more details will have to be inserted.

Article 22.3 LED states (own marking):

*'3. Member States shall provide for the processing by a processor to be governed by a contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller and that sets out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller. That contract or other legal act shall stipulate, **in particular**, that the processor:*

(a) acts only on instructions from the controller;

(b) ensures that persons authorised to process the personal data have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality;

(c) assists the controller by any appropriate means to ensure compliance with the provisions on the data subject's rights;

(d) at the choice of the controller, deletes or returns all the personal data to the controller after the end of the provision of data processing services, and deletes existing copies unless Union or Member State law requires storage of the personal data;

(e) makes available to the controller all information necessary to demonstrate compliance with this Article;

(f) complies with the conditions referred to in paragraphs 2 and 3 for engaging another processor.'

All this, and maybe more, would need to be inserted in sufficient detail into the CIS Decision.

Article 1 (11): The unequivocal statement that 'Directive (EU) 2016/680 shall apply to the processing of personal data under this Decision' makes any mention of EUDPR in the Decision dubious, as it may be contradictory to this article.

Article 1 (13): The state of affairs described above, namely the LED as only legal basis for the Controller-Processor relationship for CIS, has as its most important consequence, that the content of Article 1 (13) of the Proposal must be changed: The reference to article 62 EUDPR should be removed, and replaced by a reference to articles 41 and 51 LED respectively. This would only be logical, seeing the proposed new text of article 20 of the Decision, inserted by article 1 (11) of the Proposal.

The European Data Protection Supervisor (EDPS) as such is only competent in the case of application of EUDPR. The EDPS is however, together with the competent data protection authorities of the MS, a member of the EDPB (European Data Protection Board). In practice, EDPS and the national data protection authorities would cooperate when article 51 LED is applied.

CYPRUS

Regarding amendment of Article 1 paragraph 2 of the Council Decision of 2009/917/JHA, Cyprus agrees with the position of the Commission as it offers more clarity. Particularly the National Customs Code (Law 94(I)2004) refers to criminal offences and there is no distinction between severe and non-severe offences. Concerning the rest of the articles of the proposed Regulation, Cyprus has no comments.

CZECHIA

The Customs Administration of the Czech Republic welcomes the proposed text and considers it to be of good quality and balanced. We have no major comments. We agree with our Estonian colleagues and their opinion expressed at the meeting that it is necessary to clarify clearly how records entered into the CIS under the existing legislation before the entry into force of the amending regulation will be viewed and handled in the future.

DENMARK

Regarding point 1 below (proposal for a regulation) Denmark retains a reservation. The proposal contains reference and specific wording in regard to Article 2a of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU.

At the LEWP meeting on the 12 July 2023 the Council Legal Service (CLS) presented certain remarks in relation to the Protocol and proposed to clarify potential issues on a technical level with the Commission.

Denmark kindly requests to be informed in more detail on the CLS opinion in relation to the Protocol No 22 as any matter involving the Protocol is of great importance to Denmark. Likewise, please inform us if the CLS has reached an agreement with the Commission on the matter.

These remarks may also be shared with our colleagues in the CLS and Commission.

FINLAND

In general terms FI welcomes the Commission's proposal to amend the council decision 2009/917/JHA (later CIS-decision). It is important that the various so-called old 3rd pillar EU legislative instruments containing personal data processing regulations will be brought into line with the general EU legislation on the protection of personal data, as this will ensure a high level of personal data protection in the EU.

Moreover, FI supports the general goal of the proposal to clarify the applicable legislation so that the general principles and rules contained in the EU's evolved general legislation on the protection of personal data are applied to the processing of personal data by customs administrations instead of outdated and overlapping special regulations. At the same time, a uniform and high level of personal data protection is ensured within customs law enforcement cooperation and related exchange of information between the member states. The amendments will also strengthen coherent data processing activities and harmonized application of the LED-directive in the Member States.

After having studied the text of the proposal FI considers most of the individual changes to the CIS-decision presented in the draft regulation to be necessary and well founded in order to bring the decision into line with the provisions of the LED-directive. Still, we have the following issues that we would like to clarify (by the Commission or Presidency) during the coming discussions in the Working Party:

1. **The division of tasks and responsibilities of controller and processor between the Commission and the MS**. According to the amendment proposed by the Commission to article 3 in relation to the processing of personal data in the Customs Information System, *the Commission shall be considered the **processor**, within the meaning of point (12) of Article 3 of Regulation (EU) 2018/1725, acting on behalf of the national authorities designated by each Member State, which shall be considered the **controllers** of the personal data.*

   We think that this division of tasks and related responsibilities needs further discussion and we would like the Commission or the Presidency to clarify the reasoning behind this clear-cut division of tasks of controller and processor between the Commission and the MS. Bearing in mind the central role of the Commission in setting up and operating the infrastructure of CIS and it's databases and the responsibilities tied to this role, shouldn't the Commission be also considered as a *controller* within the meaning of point (8) of Reg.

(EU) 2018/1725? This issue needs further discussion and close examination in the working party.

2. **The reference to article 39 of the LED-directive in article 7 para 3 of the proposal.** In article 7 para 3 regarding the conditions of access to the CIS by international or regional organizations, there is a reference to 39 of the LED-directive, which we find troublesome. LED article 39 concerns transfers of personal data to private individuals (recipients) in third countries. In this case, the recipients cannot be international or regional organizations and hence, the need for this reference to article 39 of the LED is unclear for us. In any case, we would like the commission to shed light to the reasoning behind the inclusion of this reference to article 39 of the LED-directive.

These are our initial comments on the proposal. We are still going through national coordination with our Parliament, Ministry of Justice and the Office of the Data Protection Ombudsman, so further FI views, and comments are possible during the discussions in the Working Party (LEWP-C).

FRANCE

Les autorités françaises formulent les observations suivantes sur la proposition :

Article 3 paragraphe 2 : la modification proposée tendrait, selon notre lecture du texte, à donner à la Commission un rôle de sous-traitant et aux États membres un rôle de responsables de traitement. Cela pourrait soulever des difficultés, en effet :

L'article 4 7° du RGPD définit le responsable de traitement comme : « *la personne physique ou morale, l'autorité publique, le service ou un autre organisme qui, seul ou conjointement avec d'autres, détermine les finalités et les moyens du traitement; lorsque les finalités et les moyens de ce traitement sont déterminés par le droit de l'Union ou le droit d'un État membre, le responsable du traitement peut être désigne ou les critères spécifiques applicables à sa désignation peuvent être prévus par le droit de l'Union ou par le droit d'un État membre* ».

Au 8° du même article le sous-traitant est défini comme : « *la personne physique ou morale, l 'autorité publique, le service ou un autre organisme qui traite des données à caractère personnel pour le compte du responsable du traitement* ».

Au regard de ces définitions, la Commission européenne est responsable de traitement et non sous-traitant comme elle souhaite le faire inscrire dans le texte.

En outre, lors de la rédaction de l'analyse d'impact relative à la protection des données (AIPD) du traitement système d'information douanier (SID), la majorité des informations relatives à la structure du traitement et à la sécurité de ce dernier n'a pas pu être renseignée dans la mesure où c'est l'OLAF qui gère la partie technique du traitement.

Article 8 paragraphe 1 : les autorités françaises souhaitent avoir des précisions sur la distinction entre données personnelles et données non personnelles dans le cadre du SID.

Article 8 paragraphe 4 : les autorités françaises souhaitent avoir des précisions sur la distinction entre données personnelles et données non personnelles dans le cadre du SID.

GERMANY

Following the LEWP-C meeting on 10 July 2023, and with reference to No. 1 of your e-mail mentioned below, I would like to send you our statement on agenda item 4 ("Proposal for a Regulation of the European Parliament and of the Council amending Council Decision 2009/917/JHA (...)").

With reference to the other MS taking the floor in meeting of, we also point out the need for a clear division of tasks and roles between the COM and the MS.

The envisaged changes in Art. 3(2) sentence 1 of Council Decision 2009/917/JHA could lead to an unclear legal situation, so that the wording used in Art. 3(2) of the present draft needs to be concretised for clarification. The distribution of roles and tasks should therefore be set out directly in the CIS Decision by making adjustments to Article 3.

I therefore suggest including a supplementary sentence in the draft as Art. 3(2) sentence 2 in order to clarify that the COM may only process personal data for its task, namely the provision of the technical infrastructure.

My proposed wording for an Art. 3(2) sentence 2 would be: "The Commission may process personal data only in the context of providing the technical infrastructure. In addition, processing

within the meaning of Article 3(3) of Regulation (EU) 2018/1725 shall be reserved to national authorities designated by each Member State."

To that extent, Germany withdraws its scrutiny reservation.

HUNGARY

Referring to the LEWP (customs) meeting on 10 July, we kindly inform you that we do not have any remarks or proposals.

ITALY

No further comment or request for modification, as already agreed during the previous meeting and in coherence with the position of the other MS. We consider the proposal in line with the Union policy, in order to provide a strong and coherent personal data protection framework in the Union.

POLAND

Art. 1 par. 2 (of the Council Decision 2009/917/JHA)

We supports the replacement of the term 'serious contraventions of national laws' by a reference to "criminal offences under national laws".

Art. 3 par. 2

We also support a proposal to clarify the role of the European Commission as data processor.

Art. 8 par. 4

We recommend the development of uniform standards for the transfer of data from the Customs Information System, together with a definition of measures to ensure the security of such data by the Committee referred to in Article 27 of Council Decision 2009/917/JHA.

SLOVENIA

1) Article 1(4)

5. In no case shall **personal data** referred to in Article 10 of Directive (EU) 2016/680 be entered into the Customs Information System.

On the meeting on 10 of July 2023, SI suggested that the reference to Article 10 of Directive (EU) 2016/680 is replaced with all the data element from Article 10 of Directive (EU) 2016/680 which are the following: personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation. IE supported SI proposal.

On the meeting on 10 of July 2023, COM did not support our proposal. AT as a compromise proposed that the definition includes special categories of personal data.

To conclude with the line of compromise, SI now supports AT option that the definition includes **special categories of personal data** and not only personal data as it currently in the proposal. With the line of this, we do not see any more the need to list all the data element from Article 10 of Directive (EU) 2016/680.

2) Art 1(9)

Personal data entered into the Customs Information System shall be kept only for the time necessary to achieve the aim stated in Article 1(2) and may not be retained for more than five years. However, exceptionally, that data may be kept for an additional period of at most two years, where and insofar as a strict need to do so in order to achieve that aim is established in an individual case

SI position is that the retention period should be limited with the line of proportionality. Moreover, the future clarification by COM is needed about the retention period.

On the meeting 10 of July 2023 COM explained the aim of the modification of retention period. It was stressed that the Council Decision 2009/917/JHA is the legal act establishing the Customs Information System (CIS) in the former third pillar of the EU. Besides this legal act, there is the Council Regulation (EC) No 515/97 which established the CIS of the former first pillar. The modification of the retention period is necessary to harmonize retention period from Council Decision 2009/917/JHA with the retention period from the Council Regulation (EC) No 515/97.

On the meeting 10 of July 2023 SI suggested modification of 5th paragraph of recital of proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending

Council Decision 2009/917/JHA, as regards its alignment with Union rules on the protection of personal data.

The reason for this is that the paragraph 5 of Recital of proposal explains the reasons for changing the current retention period on the new maximum retention period of five years which can be increased, subject to justification, by an additional period of two years.

On the meeting 10 of July 2023 SI suggested to add in paragraph 5 explanation that the modification of the retention period was also done on the basis of the latest amendment of Regulation 515/97, namely in the direction of unifying the rules in the field of data protection from Regulation 515/97 with Decision 2009/917/JHA and the associated data retention period. COM supported proposal from SI.

To conclude with the line of COM supports we would like to add in the paragraph 5 of Recital of proposal the clarification that the modification of the retention period is also done on the basis of the latest amendment to Regulation 515/97, namely in the direction of unifying the rules in the field of data protection from Regulation 515/97 with CIS Decision 2009/917/JHA and the associated data retention period.

SWEDEN

SE welcomes the initiative to amend the council decision to better align with the LED.

SE notes that articles **13(5)**, **27(2)a**, **28(3)**, and **29** all contain references to other articles in the decision that are affected by the Commission's proposal and therefor need to be amended accordingly.

Article 4(5): SE notes that the proposal is in line with the Council's decision. However, there can be situations where physical appearance is both related to an individual's health and an important detail when looking for a suspect in customs related crimes (such as a suspect walking with a limp for example). Ethnicity, such as a suspect speaking a language specific to a certain ethnic group, can likewise be an important detail in certain situations. The LED allows for registration of sensitive information under certain circumstances, such as when authorized by Union law. SE thinks it would be valuable to allow for personal information about health and ethnicity to be processed, but of course only when strictly necessary, and with appropriate safeguards for the rights and freedoms of the data subject. We believe this would be in alignment with the exceptions in article 10 LED.

Article 8(1): SE notes that the proposal is stricter than the current decision, which allows for personal data to be processed for administrative or other purposes with prior authorisation of, and subject to any conditions imposed by, the Member State which entered the data into the system. SE notes that such processing can be allowed in Union law according to article 9(1) LED and proposes that the possibility to process data from the system shall be allowed in the same way in the new regulation as it is today in the council decision.

Article 20: As the European data protection supervisor noted on the 4th of July 2023 in their opinion 30/2023 on the proposal, the LED cannot apply to the activities of the Commission as processor of the CIS directly. While it is possible that the Member States as controllers reach agreements with the Commission as processor on the basis of national laws implementing the LED, the processing activities of the Commission, including the CIS as such, would still fall under the EUDPR, whereas the processing operations in the CIS by the competent authorities of the Member States fall under the national laws implementing the LED.

If the article is deemed necessary (seeing as the above is true whether or not it is stipulated in the new regulation), SE therefor proposes that the wording is changed to 'National laws implementing ~~D~~directive (EU) 2016/680 ~~shall apply~~ applies to the Member States' processing of personal data under this Decision.'.