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#### NOTE

|                 |                                                                                                                                                                                                                                   |
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| From:           | Presidency                                                                                                                                                                                                                        |
| To:             | Delegations                                                                                                                                                                                                                       |
| No. prev. doc.: | 11438/23                                                                                                                                                                                                                          |
| No. Cion doc.:  | 9375/1/23 REV 1                                                                                                                                                                                                                   |
| 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<br>– Compilation of written comments |

Following the request for contribution (CM 4480/23), delegations will find attached a compilation of replies received from Member States on the abovementioned proposal following the meeting of the LEWP (Customs) on 19 September 2023.

Member States' comments regarding the proposal following the meeting of the LEWP (Customs) on 10 July 2023 can be found in 11438/23

**WRITTEN COMMENTS**

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## **BELGIUM**

BE agrees with the compromise text. We have no objection of moving specific articles to the recitals, as suggested by the Commission. We want to note that having a contract or an arrangement depends on the roles of the Commission and the Member States. A contract is necessary if the Commission is processor. In all other cases, an arrangement is sufficient (reference to GDPR art. 26 and 28 and to LED article 21 and 22).

## **FRANCE**

Pour les autorités françaises, il convient **de s'assurer que la Commission endosse le rôle qu'il se doit en application des textes européens et des définitions qu'ils en donnent.**

Comme déjà indiqué au mois d'août, les autorités françaises soulignent les éléments suivants :

- 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 désigné 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 et pour les autorités françaises, **la Commission européenne est responsable de traitement et non sous-traitant** comme elle souhaite le faire inscrire dans le texte.

De plus, les autorités françaises soulignent que **la COM indiquait à l'article 3§2 qu'elle était sous-traitant et que les EM étaient responsables de traitements**. Lors du dernier groupe, **la Présidence a purement et simplement supprimé la phrase de l'article 3§2** qui indiquait qu'elle était sous-traitante et les EM responsables de traitements. **Or, la simple suppression de cette phrase ne vient pas clarifier les rôles comme le souhaitent les différents EM, au contraire.**

En conclusion, **les autorités françaises réaffirment leur position en demandant que les rôles respectifs de la Commission et des États membres soient mentionnés dans le règlement, en adéquation avec la réalité des traitements**, une fois que la Commission aura apporté les éclaircissements nécessaires. En outre, les autorités françaises souhaitent savoir ce qui justifie pour la Commission de se positionner en tant que sous-traitant et non responsable de traitement.

## COURTESY TRANSLATION

For the French authorities, it is necessary **to ensure that the Commission endorses its role in the application of the European texts and their definitions.**

As already stated in August, the French authorities stress the following:

- Article 4-7° GDPR defines **the controller** as: ‘ *the natural or legal person, public authority, department or other body which, alone or jointly with others, **determines the purposes and means of the processing**; where the purposes and means of such processing are determined by Union law or the law of a Member State, the controller may be designated or the specific criteria for its designation may be laid down by Union law or by the law of a Member State.*’
- In 8° of the same article the **subcontractor** is defined as: ‘ *the natural or legal person, public authority, department or other body which processes personal data on behalf of the controller*’.

In the light of these definitions and for the French authorities, **the European Commission is a controller and not a processor** as it wishes to have it included in the text.

In addition, the French authorities point out that **the COM indicated in Article 3(2) that it was a processor and that the MS were responsible for processing.** At the last Working Party, **the Presidency simply deleted the sentence of Article 3(2),** which stated that it was a subcontractor and the MS responsible for processing operations. **However, the mere deletion of that sentence does not clarify the roles as the various Member States wish, on the contrary.**

In conclusion, **the French authorities reiterate their position by calling for the respective roles of the Commission and the Member States to be mentioned in the Regulation, in line with the reality of the processing** operations, once the Commission has provided the necessary clarifications. In addition, the French authorities would like to know what justifies the Commission’s position as a processor and not a controller.

## **GERMANY**

"Regarding Article 3 paragraph 2 we would like to point out that the clarification of the distribution of roles already in the text of the regulation is an important concern for Germany. Due to the importance of a clear understanding of roles the adoption of an implementing regulation regarding this issue is not sufficient in our view. Therefore we see the necessity to include in Article 3 paragraph 2 a clarifying definition regarding the division of roles between the COM and the MS to avoid an unclear legal situation.

As already mentioned we propose the following wording:

"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."

This is also necessary because otherwise, in our view, the provisions in Recital 4 and Articles 20 (2) and 26a, in which the COM is placed in relation to the processor, may prove futile. In Germany's view, unless a definition is included in Article 3 (2), the above mentioned articles would otherwise need to be adapted."

## **ITALY**

No additional comments. We confirm what already answered with our email dated 10.08.2023 (Annex 1)

## **POLAND**

We would like to inform you that, following our analysis, we have no comments on the compromise 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.