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From:	General Secretariat of the Council
To:	Antici Group (Simplification)

Subject:	Consultation on Omnibus VII (GDPR/P2B/ePrivacy) digital rules - related to AGS meeting of 27.02.26 (deadline 18.03.26) - comments from DE
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Delegations will find attached the comments from Germany on GDPR.

Presidency compromise text	Drafting suggestions	Comments
(...)	(...)	(...)
15. After Article 88, the following articles are added:		
		General comment to Article 88a, 88b DSGVO GDPR and Article 1 5 (3) ePrivacy-Directive. Germany is aware, • that the use of cookies and consent banners for purposes of tracking and personal advertising by websites and companies is met with disapproval from end-users and consumers especially, • that the use of cookies requiring consent for online service business models seems to online users being overwhelmed with consent requests ("consent fatigue"), • that to enable end-users to their fundamental rights on the protection of personal data and privacy cookie banners need to be properly designed, so that end-users can take knowledge of the information and can give a legally valid consent so that service providers can rely on this consent • that many digital services and media services in particular use tracking cookies, profiling, and personalized advertising to finance their online services, and

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		• of the website operators and companies being dependant from dominant intermediaries who not only control a large share of the data and profits but are also based in third countries. In consequence, a consistent and effective regulation on the European level of access to terminal equipment of end-users is essential to guarantee protection of personal data and privacy as fundamental rights, of consumers and to come to a fair and level-field competition in the EU. We advocate a risk-based regulatory approach that guarantees the fundamental rights to privacy and the protection of personal data, while appropriately considering the interests in data use and ensuring fair competition in the internal market. Regulations that could allow individual companies to become gatekeepers and influence other companies' market access must be avoided at all costs. With respect to this Germany is open for any innovative and progressive regulatory approach, which leads to a significant simplification and reduction of bureaucracy for end-users and consumers and companies. Furthermore, Germany emphasizes that the regulatory framework must be coherent with

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		Regulation (EU) 2024/1083 (European Media Freedom Act – EMFA) and that media pluralism and the economic sustainability of journalism are essential. As any regulation on terminal equipment should avoid disproportionate burdens on online services in general, this applies to media services in particular. Further examination reserved we ask the following questions on Articles 88a and 88b. - What is the scope of application (use cases) and how can the effective application and enforcement of Articles 88a and 88b be ensured so that the simplifications actually reach consumers? - How can be ensured that the regulation applies to all relevant use cases but does not unintentionally encompass scenarios that are unrelated to the regulatory purpose? - What are the effects on online services and media services in particular regarding their ability to request the consents for tracking cookies they use to finance the service through targeted advertising? - How can a risk-based regulatory approach be achieved, that ensures fair competition in the internal market while avoiding regulations that could allow individual

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		companies to become gatekeepers and influence other companies' market access? The Commission intends to take further steps regarding the ePrivacy-Directive at a later time, depending on an in deep impact assessment. Such an impact assessment seems to be necessary with regard to the proposals in Articles 88a and 88b already within the framework of this proposal. Germany therefore • asks the Commission to carry out an impact assessment within the Digital Omnibus process and present to the AGS the findings in detail that led to the proposals in Articles 88a and 88b regarding • the simplification expected for end-users and consumers also with reference to Article 5 Paragraph 3 ePrivacy-Directive remaining unaffected, • the expected simplification for service providers,

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		• the expected impact on those digital services and media services, that finance their service through advertising based on tracking cookies for advertising, • the expected impact on audience measurement, in particular whether Article 88a(3) allows for the continued use of independent third-party measurement for the verification of reach and advertising performance, • the expected impact on the digital economy, the IoT-sector, machine-to-machine communications and new technologies in general, in particular the automotive sector, • the expected impact on controllers whose storing of personal data or gaining of access to personal data stored in the terminal equipment of a natural person is outside of the scope of application and without relation to the regulatory purpose of the ePrivacy Directive,

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		• whether and how web browsers and their providers, when being technically placed in the consent management between users and service providers, will be hindered to take undue commercial advantage and become new gatekeepers. • In addition, we support suggestions by other MS inviting the EC to elaborate on the technical process and organize a technical workshop on the articles 88a and 88b of the digital omnibus. Depending on the outcome of such presentation and the technical workshop Germany reserves to consider further comments which may include • invite the Commission to further elaborate on a comprehensive approach to the regulation of terminal equipment, in accordance with fundamental rights and taking into account the legitimate interests ○ of end-users and consumers in particular, ○ of the digital economy in general and media services in particular,

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		as well as ○ regarding machine-to machine-communication, IoT-applications and new technologies.
‘Article 88a		
Processing of personal data in the terminal equipment of natural persons		As a preliminary remark in general we tend to a uniform regulation that applies to both personal data and information without personal data. As the GDPR is focussed on the processing of personal data, this may be achieved by two similar regulations in the GDPR (for personal data) and the ePrivacy-Directive (for non-personal data) or by a unique regulation in the ePrivacy-Directive.
(1) Storing of personal data, or gaining of access to personal data already stored, in the terminal equipment of a natural person is only allowed when that person has given his or her consent, in accordance with this Regulation.		
(2) Paragraph 1 does not preclude storing of personal data, or gaining of access to personal data already stored, in the terminal equipment of a natural person, based on Union or Member State law within the meaning of, and subject to the		Paragraph 2 may be deleted as it is unclear what purpose it serves.

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conditions of Article 6, to safeguard the objectives referred to in Article 23(1).		
(3) Storing of personal data, or gaining of access to personal data already stored, in the terminal equipment of a natural person without consent, and subsequent processing, shall be lawful to the extent it is necessary for any of the following:		With regard to legal obligations for controllers to transmit personal data, such as Article 5 (2) in conjunction with Article 6 (8) Regulation (EU) 2015/758, should a further exemption for compliance with legal obligations be considered? Does the enumerative list in Article 88a Paragraph 3 preclude the application of Article 6 GDPR as a legal basis for processing in the form of storing personal data or gaining access to personal data already stored in the terminal equipment of a natural person? Could the relation to Article 6 GDPR be clarified?
(a) carrying out the transmission of an electronic communication over an electronic communications network;		
(b) providing a service explicitly requested by the data subject;		
(c) creating aggregated information about the usage of an online service to measure the audience of such a service, where it is carried out by the		The notion of audience measurement should be aligned with Recital 12 EMFA. Professional measurements serve as a “market currency” and

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controller of that online service solely for its own use;		must be certifiable by independent third parties (Joint Industry Committees) to ensure a level playing field between media services and large online platforms that conduct self-measurements within their proprietary ecosystems. Given that such a permission to access terminal equipment which is part of the privacy of end-users, a right to object should be granted.
(d) maintaining or restoring the security of a service provided by the controller and requested by the data subject or the terminal equipment used for the provision of such service.		
		The question on how to deal with further processing needs to be examined. Is there a need to clarify the relation to Article 6 Paragraph 4 GDPR?
(4) Where storing of personal data, or gaining of access to personal data already stored, in the terminal equipment of a natural person is based on consent, the following shall apply:		The Commission seems to target in Paragraph 4 not only situations where the controller can identify the data subject. What happens in cases where an end-user has deleted cookies or flags which document the refusal to give consent? Is the service allowed to make a new request for consent before the expiration of the six months-period (analogue to Number 51 of the Joint Guidelines of the COM and the EDPB on the Interplay between the Digital Markets Act and the General Data Protection Regulation).

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		Questions arise: Many online services rely on consent. How can service providers offer their service to users that have rejected consent but may have changed their mind within the 6-months time frame? How can it be guaranteed for media service providers in particular and the digital economy in general, that lawful models to finance their services can be presented to the user at any time? Paragraph 4 may strengthen the self-determination of the consumers concerned and create reliable rules for all market participants. Crucially, the rule must be practical. In particular, uncertainties remain regarding the implementation of Article 88a(4)(c). According to current assessments, this requires a rule that provides a legally sound framework for the processing of personal data for the purpose of implementing the obligations of Article 88a(4) (c). Article 88b seems of great relevance in this context.
(a) the data subject shall be able to refuse requests for consent in an easy and intelligible		

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manner with a single-click button or equivalent means;		
(b) if the data subject gives consent, the controller shall not make a new request for consent for the same purpose for the period during which the controller can lawfully rely on the consent of the data subject;		
(c) if the data subject declines a request for consent, the controller shall not make a new request for consent for the same purpose for a period of at least six months.		It should be discussed if the controller can make a new request in case of relevant technical changes. This question should be deeper examined in particular with the demands of media services. Furthermore, the period of 6 months as proposed by the Commission needs to be discussed. Without impact assessment an appropriate period cannot be determined.
		A clarification on the processing of personal data gathered by this paragraph seems to be necessary (see above).
This paragraph also applies to the subsequent processing of personal data based on consent.		

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(5) This Article shall apply from [OP: please insert the date = 6 months following the date of entry into force of this Regulation]		
Article 88b		General remarks to Article 88b:
Automated and machine-readable indications of data subject's choices with respect to processing of personal data in the terminal equipment of natural persons		Germany supports the Commission's objective of fostering the development of solutions with suitable interfaces to relieve users of online services from numerous consent requests and enable them to manage their declarations in a user-friendly manner. The Commission intends to require service providers to respect automated and machine-readable data concerning the data subject's choices as soon as relevant standards are available. Simultaneously, web browser providers should provide technical means for users to grant, refuse, or opt out of consent via automated and machine-readable means.
(1) Controllers shall ensure that their online interfaces allow data subjects to:		The Commission's proposal for Article 88b currently raises the following questions:
(a) Give consent through automated and machine-readable means, provided that the conditions for consent laid down in this Regulation are fulfilled;		Establishing the necessary standards stipulated in the regulation has proven very challenging in the past. A realistic assessment of the feasibility of establishing corresponding robust, reliable, and
(b) decline a request for consent and exercise the right to object pursuant to Article 21(2) through automated and machine-readable means.		

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(2) Controllers shall respect the choices made by data subjects in accordance with paragraph 1.		universally accepted standards within a reasonable timeframe now appears difficult.
(3) Paragraphs 1 and 2 shall not apply to controllers that are media service providers when providing a media service.		Web browser providers are commercial enterprises with vested economic interests. The most widely used web browsers and operating systems installed on European users' devices are controlled by US companies that have amassed enormous data power. European legislators should enact regulations to counteract this data power. The Commission's proposal carries the risk of creating new gatekeepers. Web browsers must be neutral between providers and users of digital services and this must be ensured through strict regulation.
(4) The Commission shall, in accordance with Article 10(1) of Regulation (EU) 1025/2012, request one or more European standardisation organisations to draft standards for the interpretation of machine-readable indications of data subjects' choices.		Germany has recently established a regulatory framework aimed at developing consent management services, recognized by the Federal Commissioner for Data Protection and Freedom of Information as an independent data protection supervisory authority, which are then made available to users. The regulatory framework is currently based on the voluntary integration of such services by digital service providers. Media services do not need to be given preferential treatment in this regard. However, if such integration occurs, websites and providers must permanently respect the decisions made by users via the consent management service.
Online interfaces of controllers which are in conformity with harmonised standards or parts thereof the references of which have been published in the Official Journal of the European Union shall be presumed to be in conformity with the requirements covered by those standards or parts thereof, set out in paragraph 1.		
(5) Paragraphs 1 and 2 shall apply from [OP: please insert the date = 24 months following the date of entry into force of this Regulation].		

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(6) Providers of web browsers, which are not SMEs, shall provide the technical means to allow data subjects to give their consent and to refuse a request for consent and exercise the right to object pursuant to Article 21(2) through the automated and machine-readable means referred to in paragraph 1 of this Article, as applied pursuant to paragraphs 2 to 5 of this Article.		Germany would like to know whether such accredited consent management services may be embedded in automated and technical measures foreseen in Article 88b. Germany is counting on the development of recognized consent management services on the market, thereby achieving the goals pursued by the Commission with its proposals, especially strengthening user sovereignty regarding informed consent. A first such service is now available. This new system for consent management still needs to be evaluated with regard to its functioning and the voluntary approach in particular. However, Germany would like to promote a similar regulation for the EU, enabling end-users and service providers to use accredited consent management services. The German regulation may be presented within the proposed technical workshop on the Articles 88a and 88b.
(7) Paragraph 6 shall apply from [OP: please insert the date = 48 months following the date of entry into force of this Regulation].		