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from:	Presidency
to:	Working Party on Data Protection and Exchange of Information
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Subject:	General Data Protection Regulation - Right to be forgotten, the right to data portability and profiling

1. Following the discussion of the Presidency paper on the incorporation of the risk-based approach in Chapters IV (Controller and Processor) and III (Rights of the Data Subject), the Presidency presents redrafted text of articles of Chapter III related to the right to be forgotten, the right to data portability and profiling.
2. The Presidency has sought to incorporate these changes into the revised draft of the Regulation issued at the end of the Cyprus Presidency. As the changes introduced into document had not yet been discussed, the underlined text has been kept. New changes are indicated in underlined bold text.

Article 17

Right to be forgotten and to erasure¹

1. The (...) controller² shall have the obligation to erase personal data (...) and the data subject shall have the right to request the erasure of personal data⁴ (...) ⁵ where one of the following grounds applies:

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- ¹ SI reservation (due to potential conflict with freedom of expression). Whereas some Member States welcomed the proposal to introduce a right to be forgotten (AT, EE, FR, IE); other delegations were more sceptical as to the feasibility of introducing a right which would go beyond the right to obtain from the controller the erasure of one's own personal data (DE, DK, ES). The difficulties flowing from the proposed drafting of this article (BE) or from the household exception (UK), to apply such right to personal data posted on social media were highlighted (BE, DE, FR), but also the impossibility to apply such right to 'paper/offline' data was stressed (EE, LU, SI). Some delegations (DE, ES) also pointed to the possible externalities of such right when applied with fraudulent intent (e.g. when applying it to the financial sector). Several delegations referred to the challenge to make data subjects active in an online environment behave responsibly (DE, LU and UK) and queried whether the creation of such a right would not be counterproductive to the realisation of this challenge, by creating unreasonable expectations as to the possibilities of erasing data (DK, LU and UK). Some delegations thought that the right to be forgotten was rather an element of the right to privacy than part of data protection and should be balanced against the right to remember and access to information sources as part of the freedom of expression (DE, ES, LU, NL, SI, PT and UK). It was pointed out that the possibility for Member States to restrict the right to be forgotten under Article 21 where it interferes with the freedom of expression is not sufficient to allay all concerns in that regard as it would be difficult for controllers to make complex determinations about the balance with the freedom of expression (UK). In general several delegations (CZ, DE, FR) stressed the need for further examining the relationship between the right to be forgotten and other data protection rights. The Commission emphasised that its proposal was in no way meant to be a limitation of the freedom of expression. The inherent problems in enforcing such right in a globalised world outside the EU were cited as well as the possible consequences for the competitive position of EU companies linked thereto (AT, LV, LU, NL, and SI).
- ² DE pointed to the difficulties in determining who is the controller in respect of data who are copied/made available by other controllers (e.g. a search engine) than the initial controller (e.g. a newspaper). AT opined that the exercise of the right to be forgotten would have take place in a gradual approach, first against the initial controller and subsequently against the 'secondary' controllers. ES referred to the problem of initial controllers that have disappeared and thought that in such cases the right to be forgotten could immediately be exercised against the 'secondary controllers' ES suggested adding in paragraph 2: ' Where the controller who permitted access to the personal data has disappeared, ceased to exist or cannot be contacted by the data subject for other reasons, the data subject shall have the right to have other data controllers delete any link to copies or replications thereof'. The Commission, however, replied that the right to be forgotten could no be exercised against journals for reasons of freedom of expression. According to the Commission, the indexation of personal data by search engines is a processing activity not protected by the freedom of expression.
- ³ DE and ES remarked that once the controller has erased the data he is unable to further disseminate them and this reference is therefore meaningless.
- ⁴ Further to remarks by DE, the chapeau of paragraph 1 has been redrafted so as to clarify that this is an objective duty of the data controller (cf. wording of paragraph 3), regardless of the exercise of the subjective right of the data subject under paragraph 1. FR stressed the right to be forgotten should also be available in relation to personal data made available by third parties
- ⁵ Several delegations (BG, CZ, DE, FR, NL, UK) have stated that the reference to children conveys the impression of a different regime for data made available by children (DE moreover

- (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed **or their storage period has expired**;
- (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1)⁶ (...) ⁷ and (...) there is no other legal ground for the processing of the data;
- (c) (...) ⁸;
- (d) (...) ⁹;
- (e) **the data have to be erased for compliance with a legal obligation to which the controller is subject**¹⁰.

2. (...) ¹¹

⁶ pointed to the practical difficulties in determining the applicability of any such special regime). DE and SK thought that the consequences of any withdrawal or limitation of consent should rather be regulated in Article 7. DK queried why there was no reference to Articles 9 and 20 DE also queried whether any such withdrawal would have an effect *ex tunc* or *ex nunc*. DE, NL and PL queried about the impact of Article 21.

⁷ The Presidency agrees with DE that Article 7 does not allow limiting consent in time other than by withdrawing it. Should delegations feel there is a need to do so; this should be done in Article 7.

⁸ The Presidency agrees with DE that the exercise of the right to object should not lead to the erasure of data, but only to the restriction of the processing thereof.

⁹ Further to the remarks by several delegations (BG, CZ, DE, ES, IE, IT, LV, LU, NL, PT and UK) to the effect that 'other reasons' needed to be specified or the exercise of the right to erasure needed to be limited to cases where 'it is appropriate' (cf. Article 12(b) DPD 95/46), the Presidency has deleted the text. The Commission agreed that further specification might be needed.

¹⁰ BE proposal. The Presidency would welcome views on whether, and if so how, this Article should apply to the public sector.

¹¹ This paragraph has been moved to paragraph 3a.

3. The controller shall **erase the data**¹² without delay¹³ except to the extent that (...) retention of the personal data is necessary:
- (a) for exercising the right of freedom of expression in accordance with Article 80¹⁴; ¹⁵
 - (b) for reasons of public interest in the area of public health in accordance with Article 81¹⁶;
 - (c) for historical, statistical and scientific (...) purposes in accordance with Article 83;
 - (d) for compliance with¹⁷ a legal obligation to retain the personal data by Union or Member State law to which the controller is subject¹⁸(...)¹⁹;

¹² DE queried whether these exceptions also applied to the abstention from further dissemination of personal data. AT and DE pointed out that Article 6 contained an absolute obligation to erase data in the cases listed in that article and considered that it was therefore illogical to provide for exception in this paragraph.

¹³ DK and UK have pointed out that the requirement of acting 'without delay' is already contained in Article 12.

¹⁴ DE and EE asked why this exception had not been extended to individuals using their own freedom of expression (e.g. an individual blogger). CZ scrutiny reservation.

¹⁵ The Presidency favours removal of the “journalistic purposes” restriction in Article 80 and its replacement with “freedom of expression and information” as referred to in Article 11 of the Charter.

¹⁶ DK queried whether this exception implied that a doctor could refuse to erase a patient's personal data notwithstanding an explicit request to that end from the latter. ES and DE indicated that this related to the more general question of how to resolve differences of view between the data subject and the data controller, especially in cases where the interests of third parties were at stake. PL asked what was the relation to Article 21.

¹⁷ UK suggested adding 'or to avoid a breach of'.

¹⁸ In general DE thought it was a strange legal construct to lay down exceptions to EU obligations by reference to national law. DK and SI were also critical in this regard. UK thought there should be an exception for creditworthiness and credit scoring, which is needed to facilitate responsible lending, as well as for judicial proceedings.

¹⁹ Deleted as it was not acceptable to put different conditions to Member State laws than to Union law.

(e) (...) ²⁰.

(...)

3a. Where the controller²¹ referred to in paragraph 1 has made the personal data²² public²³ **and is obliged pursuant to paragraphs 1 and 3 to erase the data**, it shall take all reasonable steps²⁴, including technical measures, in relation to data for the publication of which the controller is responsible, to inform third parties which are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data²⁵, unless this proves impossible or would involve a disproportionate effort.(...) ²⁶.

²⁰ The reference to paragraph 4 has been deleted in accordance with the remarks by delegations (DE, PT, UK) to the effect that erasure should be clearly distinguished from restricting the processing of personal data.

²¹ BE queried whether this also covered controllers (e.g. a search engine) other than the initial controller

²² LU asked whether the limitation in paragraph 1 to personal data 'relating to them' also applies to paragraph 2.

²³ ES prefers referring to 'expressly or tacitly allowing third parties access to'. IE thought it would be more realistic to oblige controllers to erase personal data which are under their control, or reasonably accessible to them in the ordinary course of business, i.e. within the control of those with whom they have contractual and business relations. BE, supported by IE and LU, also remarked that the E-Commerce Directive should be taken into account (e.g. through a reference in a recital) and asked whether this proposed liability did not violate the exemption for information society services provided in that Directive (Article 12 of Directive 2000/31/EC of 8 June 2000), but COM replied there was no contradiction. LU pointed to a risk of obliging controllers in an online context to monitor all data traffic, which would be contrary to the principle of data minimization and in breach with the prohibition in Article 15 of the E-Commerce Directive to monitor transmitted information.

²⁴ LU queried why the reference to all reasonable steps had not been inserted in paragraph 1 as well. COM replied that paragraph 1 expressed a results obligation whereas paragraph 2 was only an obligation to use one's best efforts. ES thought the term should rather be 'proportionate steps'. DE, ES and BG questioned the scope of this term. ES queried whether there was a duty on controllers to act proactively with a view to possible exercise of the right to be forgotten.

²⁵ BE and ES queried whether this was also possible for the offline world and BE suggested to clearly distinguish the obligations of controllers between the online and offline world. Several Member States (EE, IE, NL, SI) questioned the feasibility of applying this rule to national archives or more generally the expediency of applying it to the public sector (BE and PL). COM indicated national archives would be covered by paragraph 3(c).

²⁶ FR thought that further specification was required as this the cases in which a controller could be held liable for publication by third parties. DE and UK thought this rule on liability was outside the realm of data protection and should be governed exclusively by Member State press law and referred to conflicts with freedom of expression and free access to sources. Several delegations (DE, DK, ES, FR, IE, IT, LT, LU, NL, PL, SE and UK) expressed concerns on the enforceability of this rule, especially on the possibility to inform (and oblige) third parties that personal data can no longer be processed. LU asked whether it would not be more expedient to impose on the initial controller to inform the data subject of the third parties to which it has

4. (...) ²⁷.

[5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying (...) the conditions for deleting links, copies or replications of personal data from publicly available communication services as referred to in paragraph **3a**].

(...)

Article 17a

Right to restriction of processing 28

1. The data subject shall have the right to obtain from the controller the restriction of the processing of personal data where:
 - (a) the accuracy of the data is contested by the data subject, for a period enabling the controller to verify the accuracy of the data ²⁹;

disclosed the data. NL and SI asked whether this could be limited to third parties known to the initial controller. LT indicated that in the case of search engines this was impossible. DE opined the scope of this right might have to be limited to social media.

²⁷ DE agreed with this rule but thought it should be made into a general rule. The Presidency has moved this to paragraph 2a of Article 22 (see 5702/13 DATAPROTECT 2 JAI 47 MI 44 DRS 17 DAPIX 6 FREMP 3 COMIX 40 CODEC 155).

²⁸ The former paragraph 4 of Article 17 has been redrafted into a new Article, as the cases listed here are not always alternatives to erasure, as has been pointed out by several delegations (AT, FR, IT and LU).

²⁹ FR scrutiny reservation: FR thought the cases in which this could apply, should be specified.

- (b) the controller no longer needs the personal data for the **performance** of its tasks but they **are required** for the **establishment, exercise or defence of legal claims by the data subject**³⁰;
- (c) unlawful **processing of personal data has taken place but** the data subject opposes their erasure and requests the restriction of their use instead³¹;
- (d) (...) ³² ³³.
2. In automated filing systems the **restriction** of processing of personal data shall in principle be ensured by technical means; the fact that the processing of personal data is **restricted** shall be indicated in the system in such a way that it is clear that the **processing of the personal data is restricted**³⁴.
3. **Where processing of personal data has been restricted under paragraph 1 such data** may, with the exception of storage, only be processed **with the data subject's consent or for the establishment, exercise or defence of legal claims**³⁵ **by the controller or the processor**, (...) or for the protection of the rights of another natural or legal person or for an objective of public interest³⁶.

³⁰ BE suggestion, supported by NL and UK.

³¹ Several delegations did not understand this subparagraph it forms part of a list of alternatives to a request from a data subject for erasure. PT did not understand how there could be cases of unlawful processing of data which did not lead to deletion of data. FR asked for examples. Pending further clarification, the Presidency has bracketed the text.

³² Deleted in accordance with the UK remark that the right to data portability is separately regulated in Article 18 and there is no need to 'import' it here in the right to be forgotten. It has moreover been pointed out by delegations (DE and EE) that there may be cases where the exercise of the right to data portability will not automatically imply that the initial controller may no longer use the data.

³³ With reference to Write Once Read Many (WORM)-Systems and paper deeds, DE suggested adding as sub paragraph (e) ' the erasure of the personal data in accordance with Article 17 is impossible or would involve a disproportionate effort due to the special nature of the storage of the data'.

³⁴ Copied from Article 15 (2) of Regulation 45/2001.

³⁵ BE suggestion, supported by NL and UK.

³⁶ ES asked who was to define the concept of public interest

4. Where processing of personal data is **restricted** pursuant to paragraph 1 and the controller considers that the **restriction** is no longer **necessary**, the controller shall inform the data subject before lifting the **restriction** on processing³⁷.
5. (...) ³⁸.

Article 17b

Notification obligation regarding rectification or erasure ³⁹

The controller shall communicate any rectification, erasure **or restriction of processing** carried out in accordance with Articles 16, 17 and 17a⁴⁰ to each recipient to whom the data have been disclosed, unless this proves impossible or involves a disproportionate effort⁴¹.

³⁷ DE, SK and UK thought the conditions for lifting the restriction should be specified here. IE queried how this paragraph was linked to the right to rectification under Article 16. LT thought there should be deadlines to restrictions on processing.

³⁸ DE agreed with this rule but thought it should be made into a general rule. UK thought that the requirement for controllers to set up mechanisms for periodic review of the need for storage does not fit in an article primarily about erasure and the right to be forgotten and needed to be moved to Chapter IV on controller's general obligations. The Presidency has accordingly moved this to Article 22a (see 5702/13 DATAPROTECT 2 JAI 47 MI 44 DRS 17 DAPIX 6 FREMP 3 COMIX 40 CODEC 155).

³⁹ This Article was moved from Article 13 to here, as it refers to the preceding Articles 16 and 17. Whilst several delegations (ES, IT and PL) agreed with this proposed draft and were of the opinion that it added nothing new to the existing obligations under the 1995 Directive, other delegations (DE, SK and NL) pointed to the possibly far-reaching impact in view of the data multiplication since 1995, which made it necessary to clearly specify the exact obligations flowing from this proposed article. Thus, DE was opposed to a general obligation to log all the disclosures to recipients in order to ensure compliance with Article 13, now 17b. DE also pointed out that the obligation should exclude cases where legitimate interests of the data subject would be harmed by a further communication to the recipients, that is not the case if the recipient would for the first time learn negative information about the data subject in which he has no justified interest. Relevant examples should be explained in a recital.

⁴⁰ DE suggests including successful objections made in accordance with Article 19.

⁴¹ BE and ES asked that the concept of a 'disproportionate effort' be clarified in a recital. UK pointed out that in an online environment communication to all recipients may not be possible. SK pointed out that in its legal system a distinction is made between making personal data available and the provision of personal data.

Article 18⁴²

Right to data portability⁴³

1. (...) Where (...) the processing of **personal data** is based on consent or on a contract **and the data** are processed by electronic means and in a structured and commonly used format, **the data subject shall have the right** to obtain (...) a copy of **the data** undergoing processing **from the controller** in an electronic and structured format which is commonly used and **which** allows for further use by the data subject.

2. Where the data subject has provided the personal data and the processing is based on consent or on a contract, the data subject shall have the right to transmit those personal data (...) ⁴⁴ provided by the data subject and retained by an automated processing system, into another one, in an electronic format which is commonly used, without hindrance from the controller from whom the personal data are withdrawn ⁴⁵.

⁴² The Presidency would welcome views on whether, and if so how, this Article should apply to the public sector.

⁴³ UK reservation: while it supports the concept of data portability in principle, the UK considers it not within scope of data protection, but in consumer or competition law. Several other delegations (DK, DE, FR, IE, NL, PL and SE) also wondered whether this was not rather a rule of competition law and/or intellectual property law or how it related to these fields of law. Therefore the UK thinks this article should be deleted. Reference was made to an increased risk of fraud as it may be used to fraudulently obtain the data of innocent data subjects (UK). DE, DK and UK pointed to the risks for the competitive positions of companies if they were to be obliged to apply this rule unqualifiedly and referred to raises serious issues about intellectual property and commercial confidentiality for all controllers. DE, SE and UK pointed to the considerable administrative burdens this article would imply. BE, DE, FR IE, NO, PL; SE and UK failed to see how this right could also be applied in the public sector, to which COM replied that paragraph 2 was implicitly limited to the private sector. DE and FR referred to services, such as health services where the exercise of the right to data portability might endanger ongoing research or the continuity of the service. IT and NL stated that the relationship between the right to a copy of personal data and the right to access should be clarified. FR and IE were broadly supportive of this right. SK thought that the article was unenforceable.

⁴⁴ BE and FR, while having no difficulties regarding raw data, were - inter alia for intellectual property - reasons opposed to the application of this right to aggregated/modified data having undergone processing. BE pointed to the difficulties of the direct marketing sector of applying the concept of 'any other information provided by the data subject'

⁴⁵ HU thought the last part of the phrase need further precision.

2a. The rights referred to in paragraphs 1 and 2 shall be without prejudice to the controllers' intellectual property rights.

- [3. The Commission may specify the electronic format referred to in paragraph 1 and the technical standards, modalities and procedures for the transmission of personal data pursuant to paragraph 2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).]
4. [The rights provided for in Article 18 do not apply when data are processed only for historical, statistical, or scientific purposes and the conditions in Article 83(1A) are met.]⁴⁶.

Article 20

Measures based on profiling⁴⁷

1. Every data subject⁴⁸ shall have the right not to be subject to profiling⁴⁹ ⁵⁰ which produces legal effects (...) or significant adverse⁵¹ effects⁵² concerning him or her **unless such** processing⁵³:

⁴⁶ Text proposed by the Statistics Working Party in 10428/12. Supported by BE, FR, NL and UK. At a later stage, the Commission will look into the possibility of consolidating the various paragraphs on statistics into a revised version of Article 83.

⁴⁷ ES, FR and UK reservation. In accordance with the suggestion by NL, supported by ES, FR, LV, PL and PT, the text has been redrafted on the basis of the definition contained in Recommendation RM/Rec(2010)13 of the Committee of Ministers to member states on the protection of individuals with regard to automatic processing of personal data in the context of profiling (Adopted by the Committee of Ministers on 23 November 2010 at the 1099th meeting of the Ministers' Deputies). Further to the suggestion by FR the concept of profiling itself has been defined in Article 4 and Article 20 is now limited to the applicable rules. DE thinks this provision must take account of two aspects, namely, whether and under what conditions a profile (= the linking of data which permits statements to be made about a data subject's personality) may be created and further processed, and, secondly, under what conditions a purely automated measure based on that profile is permissible if the measure is to the particular disadvantage of the data subject. It appears expedient to include two different rules in this regard. According to DE Article 20 only covers the second aspect and DE would like to see a rule included on profiling in regard to procedures for calculating the probability of specific behaviour (cf. Article 28b of the German Federal Data Protection Act, which requires that a scientifically recognized mathematical/statistical procedure be used which is demonstrably essential as regards the probability of the specific behaviour).

⁴⁸ UK, LU and DE suggestion.

⁴⁹ Specification at DE suggestion.

⁵⁰ DK remarked that this was an open list of profiling measures and that it would prefer a closed list for the sake of legal certainty.

- (a) is linked to and⁵⁴ carried out in the course of the entering into, or performance of, a contract between the data subject and the data controller or a third party⁵⁵, [where the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or]⁵⁶ where suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the right to obtain human intervention **on the part of the controller and the right to contest the measure by the data subject**⁵⁷; or
- (aa) is carried out for direct marketing purposes in relation to the exercise of freedom of expression, where the data are rendered pseudonymous and the data subject has not objected to such processing in accordance with Article 19(2); or**

⁵¹ DE wondered whether automated data processing was the right criterion for selecting high risk data processing operations and provided some examples of automated data processing operation which it did not consider as high risk. DE and ES pointed out that there also cases of automated data processing which actually were aimed at increasing the level of data processing (e.g. in case of children that are automatically excluded from certain advertising). In order to allay some of these concerns the Presidency suggests adding the word 'adversely'.

⁵² Presidency suggestion in order to ally concerns voiced by DE, ES and PL that this criterion was too broad. DE wondered whether automated data processing was the right criterion for selecting high risk data processing operations and provided some examples of automated data processing operation which it did not consider as high risk. DE and ES pointed out that there also cases of automated data processing which actually were aimed at increasing the level of data processing (e.g. in case of children that are automatically excluded from certain advertising). In order to allay some of these concerns the Presidency suggests adding the word 'adversely'.

⁵³ UK scrutiny reservation on whether the proposed exemptions in paragraph 2 are sufficient, and whether there are any unintended consequences arising out of the details of Article 20, especially on sectors such as the Credit Referencing Industry that rely on profiling (e.g. credit checks for the purposes of responsible lending).

⁵⁴ BE proposal.

⁵⁵ BE proposal.

⁵⁶ The Presidency will request the Commission to clarify this text.

⁵⁷ NL had proposed to use the wording ' and arrangements allowing him to put his point of view, inspired by Article 15 of DPD 46/95. BE suggested adding this for each case referred in paragraph 2.

- (b) is (...) ⁵⁸ authorized by a Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's legitimate interests; **such processing may include processing for fraud monitoring and prevention purposes and to ensure the security and reliability of a service provided by the controller** ⁵⁹; or
- (c) is based on the data subject's consent, subject to the conditions laid down in Article 7 (...) ⁶⁰.

1a. Personal data related to children shall not be processed for the purpose of profiling ⁶¹.

3. [Measures ⁶² based on profiling referred to in paragraph 1 shall not be based solely on the special categories of personal data referred to in Article 9 ⁶³.] ⁶⁴

⁵⁸ The word 'expressly' has been deleted further to the suggestion by BE, CZ and DE.

⁵⁹ BE proposal.

⁶⁰ Further to a suggestion by DE and IE, the reference to 'suitable safeguards' has been deleted as this resulted in a lack of clarity and added nothing to data protection requirements under Article 7.

⁶¹ Further to NL proposal, in order to align the text of this paragraph to that of recital 58.

⁶² BE, IE and SK expressed a preference for the term 'decision' (from the 1995 Directive) over 'measure'.

⁶³ DK reservation; DK and UK queried why there couldn't be automated processing of health data (e.g. by insurance companies). FR and AT reservation on the compatibility with the E-Privacy Directive. IE demanded clarification as to the impact of this article on Article 8 of the Consumer Credit Directive (Directive 2008/48/EC) requires creditors to assess the consumer's creditworthiness on the basis of sufficient information 'where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant databases.'

⁶⁴ The Presidency would welcome an exchange of views on the usefulness of this paragraph. FR, AT, DK and SI had previously entered a scrutiny reservation on the word 'solely'; FR and DE had pointed out that 'not ... solely' could empty this prohibition of its meaning by allowing sensitive data to be profiled together with other non-sensitive personal data.

4. (...) The information to be provided by the controller under Articles 14 and 14a shall include information as to the existence of profiling referred to in paragraph 1 and [information concerning the logic involved in any automatic data processing⁶⁵], as well as the significance and the envisaged consequences of such processing on the data subject.
- [5. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and conditions for suitable measures to safeguard the data subject's legitimate interests referred to in paragraph 2.]

⁶⁵ Further to IT and DE suggestion.