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NOTE

from: German delegation
to: Working Party on Information Exchange and Data Protection

No. prev. doc.: 11013/13 DATAPROTECT 78 JAI 496 MI 546 DRS 119 DAPIX 88
FREMP 85 COMIX 380 CODEC 1475

No. Cion prop.: 5853/12 DATAPROTECT 9 JAI 44 MI 58 DRS 9 DAPIX 12 FREMP 7
COMIX 61 CODEC 219

Subject: Drafting suggestion for a new Article 42a and the expansion of Article 44 of the proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)

1. The German delegation takes the view that conclusions need to be drawn from the ongoing events in relation to PRISM in connection with transfers of data by multinational undertakings to authorities in third countries.

2. With that in mind, it proposes that a corresponding provision be incorporated into the new General Data Protection Regulation, referring primarily to procedures of mutual legal and administrative assistance and that, in cases where such a procedure is not followed by the court or public authority in the third country, the direct transmission of data by undertakings covered by the Regulation to courts or public authorities in third countries be made subject to an obligation to notify the data protection supervisory authorities. The legitimacy of the transfer of data to the court or public authority in the third country should be subject to the approval of the competent data protection supervisory authority.
3. The German delegation is of the opinion that the disclosure of data by undertakings to authorities in third countries should be made more transparent. Undertakings ought to disclose the legal bases for data transfers to authorities in third countries. Both citizens and the clients of undertakings ought to know why undertakings have to disclose their data, and under what circumstances.
4. The German delegation had already proposed a new subparagraph (i) to be added to Article 44(1), establishing the criterion of authorisation by a data protection supervisory authority prior to the transfer of data to third countries.
5. In that connection, it is proposed that the draft General Data Protection Regulation be supplemented by a new Article 42a, a new subparagraph (i) for insertion in Article 44(1) (as already suggested by the German delegation) and a corresponding recital, to read as follows:

*Article 42a**Disclosures not authorised by Union law*

- 1. No judgment of a court or tribunal and no decision of an administrative authority of a third country requiring a non-public controller or processor to disclose personal data shall be recognised or be enforceable in any manner, unless this is provided for by a mutual assistance treaty or an international agreement between the requesting third country and the Union or a Member State or other legal provisions at national or Union level.*
- 2. Where a judgment of a court or tribunal or a decision of an administrative authority of a third country requests a non-public controller or processor to disclose personal data, the controller or processor and, if any, the controller's representative, shall notify the supervisory authority of the request without undue delay and must obtain prior authorisation for the transfer by the supervisory authority in accordance with point (i) of Article 44 (1).*
- 3. The supervisory authority shall inform the competent national authority of the request. The controller or processor shall also inform the data subject of the request and of the authorisation by the supervisory authority.*
- 4. Paragraphs (2) and (3) shall not apply to the disclosure of personal data for the purpose of investigation, detection or prosecution of criminal offences or the execution of criminal penalties.*

Article 44

1. ...

- (i) *the competent supervisory authority has granted prior authorisation. Authorisation is not granted insofar as on an individual basis, also taking account of points (a) to (h), the data subject has overriding legitimate interests in the data not being transferred. If the transfer is related to processing activities which concern data subjects in another Member State or other Member States, or substantially affect the free movement of personal data within the Union, the supervisory authority shall apply the consistency mechanism referred to in Article 57¹.*

Recital 65a

The transmission of data in the field of international judicial cooperation in criminal matters by non-public controllers or processors to public authorities is governed exclusively by the rules of international judicial assistance in criminal matters. Therefore, Article 42a should be interpreted in such a way that information may be disclosed by non-public controllers or processors to a court of law or law enforcement agency or prosecuting authority within the framework of investigations, criminal proceedings or prosecutions only within the limits of the existing rules of judicial assistance in criminal matters and not through a new way of data transmission.

¹ Public entities should be exempted from this provision, because they are already checked by a state authority, which is itself subject to supervision and involved in procedures of mutual administrative and legal assistance.