

## COMP AM Article 44

16.10.2013

### Article 44

#### Derogations

1. In the absence of an adequacy decision pursuant to Article 41 or of appropriate safeguards pursuant to Article 42, a transfer or a set of transfers of personal data to a third country or an international organisation may take place only on condition that:

(a) the data subject has consented to the proposed transfer, after having been informed of the risks of such transfers due to the absence of an adequacy decision and appropriate safeguards; or

(b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request; or

(c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person; or

(d) the transfer is necessary for important grounds of public interest; or

(e) the transfer is necessary for the establishment, exercise or defence of legal claims; or

(f) the transfer is necessary in order to protect the vital interests of the data subject or of another person, where the data subject is physically or legally incapable of giving consent; or

(g) the transfer is made from a register which according to Union or Member State law is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in Union or Member State law for consultation are fulfilled in the particular case; or

~~*(h) the transfer is necessary for the purposes of the legitimate interests pursued by the controller or the processor, which cannot be qualified as frequent or massive, and where the controller or processor has assessed all the circumstances surrounding the data transfer operation or the set of data transfer operations and based on this assessment adduced appropriate safeguards with respect to the protection of personal data, where necessary.*~~

2. A transfer pursuant to point (g) of paragraph 1 shall not involve the entirety of the personal data or entire categories of the personal data contained in the register. When the register is intended for consultation by persons having a legitimate interest, the transfer shall be made only at the request of those persons or if they are to be the recipients.

~~*3. Where the processing is based on point (h) of paragraph 1, the controller or processor shall give particular consideration to the nature of the data, the purpose and duration of the proposed processing operation or operations, as well as the situation in the country of*~~

~~origin, the third country and the country of final destination, and adduced appropriate safeguards with respect to the protection of personal data, where necessary.~~

4. Points (b), ~~and~~ (c) ~~and (h)~~ of paragraph 1 shall not apply to activities carried out by public authorities in the exercise of their public powers.

5. The public interest referred to in point (d) of paragraph 1 must be recognised in Union law or in the law of the Member State to which the controller is subject.

~~6. The controller or processor shall document the assessment as well as the appropriate safeguards adduced referred to in point (h) of paragraph 1 of this Article in the documentation referred to in Article 28 and shall inform the supervisory authority of the transfer.~~

7. The ~~Commission~~ **European Data Protection Board** shall be *entrusted with the task of issuing guidelines, recommendations and best practices in accordance with Article 66 paragraph 1(b) empowered to adopt delegated acts in accordance with Article 86* for the purpose of further specifying ~~'important grounds of public interest' within the meaning of point (d) of paragraph 1 as well as~~ the criteria and requirements for *appropriate safeguards referred to in point (h) data transfers on the basis* of paragraph 1.

## Recitals

(86) Provisions should be made for the possibility for transfers in certain circumstances where the data subject has given his consent, where the transfer is necessary in relation to a contract or a legal claim, where important grounds of public interest laid down by Union or Member State law so require or where the transfer is made from a register established by law and intended for consultation by the public or persons having a legitimate interest. In this latter case such a transfer should not involve the entirety of the data or entire categories of the data contained in the register and, when the register is intended for consultation by persons having a legitimate interest, the transfer should be made only at the request of those persons or if they are to be the recipients, *taking into full account the interests and fundamental rights of the data subject.*

(87) These derogations should in particular apply to data transfers required and necessary for the protection of important grounds of public interest, for example in cases of international data transfers between competition authorities, tax or customs administrations, financial supervisory authorities, between services competent for social security matters *or for public health*, or to competent *public* authorities for the prevention, investigation, detection and prosecution of criminal offences, *including for the prevention of money laundering and the fight against terrorist financing. A transfer of personal data should equally be regarded as lawful where it is necessary to protect an interest which is essential for the data subject's or another person's life, if the data subject is incapable of giving consent. Transferring personal data for such important grounds of public interest should only be used for occasional transfers. In each and every case, a careful assessment of all circumstances of the transfer should be carried out.*

~~(88) Transfers which cannot be qualified as frequent or massive, could also be possible for the purposes of the legitimate interests pursued by the controller or the processor, when they have assessed all the circumstances surrounding the data transfer.~~ For the purposes of

processing for historical, statistical and scientific research purposes, the legitimate expectations of society for an increase of knowledge should be taken into consideration.

(89) In any case, where the Commission has taken no decision on the adequate level of data protection in a third country, the controller or processor should make use of solutions that provide data subjects with a ***legally binding*** guarantee that they will continue to benefit from the fundamental rights and safeguards as regards processing of their data in the Union once this data has been transferred, ***to the extent that the processing is not massive, not repetitive and not structural. That guarantee should include financial indemnification in cases of loss or unauthorised access or processing of the data and an obligation, regardless of national legislation, to provide full details of all access to the data by public authorities in the third country.***