

COMP AM Article 42

17.10.2013

Article 42

Transfers by way of appropriate safeguards

1. Where the Commission has taken no decision pursuant to Article 41, *or decides that a third country, or a territory or processing sector within that third country, or an international organisation does not ensure an adequate level of protection in accordance with Article 41(5)*, a controller or processor may *not* transfer personal data to a third country, territory or an international organisation ~~only if~~ *unless* the controller or processor has adduced appropriate safeguards with respect to the protection of personal data in a legally binding instrument.

2. The appropriate safeguards referred to in paragraph 1 shall be provided for, in particular, by:

(a) binding corporate rules in accordance with Article 43; or

(aa) a valid “European Data Protection Seal” for the controller and the recipient in accordance with paragraph 1e of Article 39;

~~(b) standard data protection clauses adopted by the Commission after consulting the European Data Protection. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2); or~~

(c) standard data protection clauses adopted by a supervisory authority in accordance with the consistency mechanism referred to in Article 57 when declared generally valid by the Commission pursuant to point (b) of Article 62(1); or

(d) contractual clauses between the controller or processor and the recipient of the data authorised by a supervisory authority in accordance with paragraph 4.

3. A transfer based on standard data protection clauses, *a “European Data Protection Seal”* or binding corporate rules as referred to in points (a), *(aa)* ~~(b)~~ or (c) of paragraph 2 shall not require any ~~further~~ *specific* authorisation.

4. Where a transfer is based on contractual clauses as referred to in point (d) of paragraph 2 of this Article the controller or processor shall obtain prior authorisation of the contractual clauses from the supervisory authority. 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 57.

~~5. Where the appropriate safeguards with respect to the protection of personal data are not provided for in a legally binding instrument, the controller or processor shall obtain prior authorisation for the transfer, or a set of transfers, or for provisions to be inserted into administrative arrangements providing the basis for such transfer. Such authorisation by the supervisory authority shall be in accordance with point (a) of Article 34(1). 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 57. Authorisations by a supervisory authority on the basis of Article 26(2) of Directive 95/46/EC shall remain valid, until *two years after the entry into force of this Regulation* unless *amended, replaced or repealed by that supervisory authority before the end of this period.*~~

Recitals

(83) In the absence of an adequacy decision, the controller or processor should take measures to compensate for the lack of data protection in a third country by way of appropriate safeguards for the data subject. Such appropriate safeguards may consist of making use of binding corporate rules, standard data protection clauses adopted by the Commission, standard data protection clauses adopted by a supervisory authority or contractual clauses authorised by a supervisory authority, ~~*or other suitable and proportionate measures justified in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations and where authorised by a supervisory authority.*~~ *Those appropriate safeguards should uphold a respect of the data subject rights adequate to intra-EU processing, in particular relating to purpose limitation, right to access, rectification, erasure and to claim compensation. Those safeguards should in particular guarantee the observance of the principles of personal data processing, safeguard data subject rights and provide for effective redress mechanisms, ensure the observance of the principles of data protection by design and by default, guarantee the existence of a data protection officer.*

(84) The possibility for the controller or processor to use standard data protection clauses adopted by the Commission or by a supervisory authority should neither prevent the possibility for controllers or processors to include the standard data protection clauses in a wider contract nor to add other clauses *or supplementary safeguards* as long as they do not contradict, directly or indirectly, the standard contractual clauses adopted by ~~*the Commission or by*~~ a supervisory authority or prejudice the fundamental rights or freedoms of the data subjects. *The standard data protection clauses adopted by the Commission could cover different situations, namely transfers from controllers established in the European Union to controllers established outside the European Union and from controllers established in the European Union to processors, including sub-processors, established outside the European Union. Controllers and processors should be encouraged to provide even more robust safeguards via additional contractual commitments that supplement standard protection clauses.*