

BRE-JBZ

From: Kaai, Geran
Sent: vrijdag 3 april 2015 15:56
To: Verweij, Ellen
Subject: FW: input for the next DAPIX meeting

From: [redacted] [mailto:[redacted]]
Sent: woensdag 14 mei 2014 17:46
To: Kaai, Geran
Subject: input for the next DAPIX meeting

Dear Mr. Kaai,

I hope this e-mail finds you well.

We are writing you on behalf of the Industry Coalition for Data Protection (ICDP) ahead of the DAPIX working group discussion on Chapter V and the corresponding recitals related to international data transfers.

We welcome the ongoing efforts of the Council to find the right balance between facilitating the free flow of information and safeguarding the personal data of European citizens in a global context. Users as well as businesses are participating in a physical and online world which crosses jurisdiction's borders and hence requires a framework that allows for the international transfers of data in accordance with appropriate safeguards. The Commission's initial proposal already contained many improvements to the current situation and we strongly welcome the refinements suggested by the Council to the text that would achieve this purpose.

Here below, we would like to offer some comments on the various provisions related to international data transfers, which we hope you will find helpful.

Adequacy decision

One of the main difficulties in the adequacy process today is an apparent focus on the existence of formal rules rather than an assessment of the actual, real-world protections extended to personal data. We, therefore, welcome the overall approach taken of broadening the scope of the various factors to be considered, such as, but not limited to, the participation in multilateral or regional systems and others. [Article 41 (2c)] This is key to achieve an international transfers regime that is future proof and recognizes multilateral efforts also in the area of privacy and data protection.

We also welcome the recognition of the challenges that a sunset clause for existing adequacy decisions may cause and the proposal to leave the existing decisions in force until amended, replaced or repealed. This proposal improves the much needed legal certainty, which a sunset clause would no doubt undermine. [See Articles 41 (3a) and 42 (5b)].

Recognising that a specific sector, such as the private sector or a specific economic sector within a third country, may offer an adequate level of data protection for the purpose of data transfers is also a positive step and we welcome the Council's support for this proposal. [Recital 80, Article 41].

Equally important is the acknowledgement that a decision that there is "no longer" adequate protection should not have a retro-active effect, [Article 41 (5)] and that such decision is without prejudice of transfers in accordance with Article 42 to 44 [Recital 82]. [redacted]

There remains sporadic references to "specific authorization", instead of "further" as proposed by the Commission, when there is an adequacy decision or safeguards are in place. The essence of these measures is that once they are approved, no other (or [redacted])

"further") notification is required. If we open the door for additional ("specific") requirements, it defeats the purpose of these instruments, it will create uncertainty and could undermine the system that has been in place and working. Therefore, the Commission's original proposal ("such transfer shall not require any "further" authorization) seems to be more in line with the purpose of the law. [Recital 80, Article 41 (1), 42 (2a)]

Transfer by appropriate safeguards

We welcome clarification of previous proposals that requirement of prior authorization should be limited to certain cases [Article 42 (2a)]. Requiring prior authorization in each and every case when another instrument, especially when those outlined in Article 44, is used seems at best very burdensome, hardly feasible in practice or linked to a better, more effective protection of data and privacy of data subjects.

We welcome the Council's efforts to further define "appropriate safeguards" and give these a proper legal status. In addition to codes of conduct and certification schemes, which we believe should have European wide effects, we welcome the Council's support of the Commission's proposal to allow the use of binding corporate rules (BCRs) for both controller and processors [Article 4 (17)], including joint undertakings or group of enterprises engaged in a joint economic activity. This instrument have become an important addition to the existing tools allowing for the international transfer of data and we welcome the integration of this instrument in the legislation.

However, we do share concerns on the lengthiness and cost of such approval process and that further improvements are need to make this instrument more broadly available than it is today. Some of the proposed addition to Article 43 (2), may be contrary to this purpose, such as the proposed requirement to explicitly include a commitment "not to process data for incompatible purposes" [point (d)].

We also welcome the possibility to use standard contractual clauses in downstream processing contracts between processors, which mirrors positive steps and work that European regulators are undertaking in this area.

Derogations for specific situations

The reason for the reference to "explicit" consent in some places [Article 44 (1a) and Recital 86], but not in others is somewhat unclear. ICDP would welcome clarification that the "explicit" standard is not applicable in all situations, and points out that this requires Articles 4 and 7 to be amended accordingly.

While we remain concerned about the possibility of suspending data transfers based on the rather vague concept of "public interest", we do welcome clarifications suggested that these should be limited to cases where there is no adequacy decision or appropriate safeguards. [Article 44 (5a), Recital 87]

Finally, we welcome the fact that the Council acknowledges the value of the "legitimate interests" ground as a basis for data transfers. ICDP notes that this legal basis will be of primary importance because of its superior potential to protect privacy compared to contract and consent, because it can provide a meaningful and most of the time more appropriate alternative to consent, and because it proves particularly useful for SMEs. [Recital 88 and Article (1h)]

We hope that you find this input useful for the discussions you will be having and in the future. We are of course at your disposal should you wish to discuss these issues in greater detail.

Kind regards,

European Digital Media Association www.europeandigitalmedia.org

Rue du Trone, 60

Tel: +

Mobile: +



The Industry Coalition for Data Protection

The Industry Coalition for Data Protection (ICDP) is comprised of 16 associations representing thousands of European and international companies who are building, delivering, and advancing the digital experience. Members of ICDP include: Association for Competitive Technologies (ACT), American Chamber of Commerce to the EU (AmCham EU), BSA | The Software Alliance (BSA), DIGITALEUROPE, European Association of Communications Agencies (EACA), European Digital Media Association (EDiMA), European Multi-channel and Online Trade Association (EMOTA), European Publishers Council (EPC), European Internet Services Providers Association (EuroISPA), Federation of European Direct and Interactive Marketing (FEDMA), GS1, IAB Europe, Interactive Software Federation of Europe (ISFE), Japan Business Council in Europe (JBCE), TechAmerica Europe and the World Federation of Advertisers (WFA).

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