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**NOTE**

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from: Presidency  
to: Working Group on Information Exchange and Data Protection (DAPIX)  
No. prev. doc.: 6762/14 DATAPROTECT 30 JAI 102 MI 191 DRS 26 DAPIX 25 FREMP 28  
COMIX 110 CODEC 503  
Subject: 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) - Chapter V

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Following the DAPIX meeting of 31 March -1 April 2014, delegations find attached the revised text of Chapter V and the corresponding recitals, as well as the relevant elements of the definitions of Article 4.

The latest changes are indicated in **bold underlining**.

78) Cross-border flows of personal data to and from countries outside the Union and international organisations are necessary for the expansion of international trade and international co-operation. The increase in these flows has raised new challenges and concerns with respect to the protection of personal data. However, when personal data are transferred from the Union to recipients in third countries or to international organisations, the level of protection of individuals guaranteed in the Union by this Regulation should not be undermined, including in cases of onward transfers of personal data from the third country or international organisation to recipients in the same or <sup>1</sup>another third country or international organisation. In any event, transfers to third countries and international organisations may only be carried out in full compliance with this Regulation. A transfer may only take place if, subject to the other provisions of this Regulation, the conditions laid down in Chapter V are complied with by the controller or processor.

79) This Regulation is without prejudice to international agreements concluded between the Union and third countries regulating the transfer of personal data including appropriate safeguards for the data subjects. **Member States may conclude international agreements which involve the transfer of personal data to third countries or international organisations, as far as such agreements do not affect this Regulation or any other provisions of EU law and include appropriate safeguards for the data subjects.**

80) The Commission may (...) decide with effect for the entire Union that certain third countries, or a territory or a processing sector within a third country, or an international organisation, offer an adequate level of data protection, thus providing legal certainty and uniformity throughout the Union as regards the third countries or international organisations which are considered to provide such level of protection. In these cases, transfers of personal data to these countries may take place without needing to obtain any specific authorisation.

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<sup>1</sup> DE suggested adding 'in the same or'.

81) In line with the fundamental values on which the Union is founded, in particular the protection of human rights, the Commission should, in its assessment of the third country, take into account how a given third country respects the rule of law, access to justice as well as international human rights norms and standards and its general and sectoral law, including legislation concerning public security, defence and national security as well as public order and criminal law. Apart from the international commitments the third country or international organisation has entered into, the Commission should also take account of legal obligations arising from the third country's or international organisation's participation in multilateral or regional systems in particular in relation to the protection of personal data. The Commission should consult with the European Data Protection Board when assessing the level of protection in third countries or international organisations<sup>2</sup>.

82) The Commission may equally recognise that a third country, or a territory or a processing sector<sup>3</sup> within a third country, or an international organisation (...) no longer ensures an adequate level of data protection. Consequently the transfer of personal data to that third country or international organisation should be prohibited, unless the requirements of Articles 42 to 44 are fulfilled. In that case, provision should be made for consultations between the Commission and such third countries or international organisations. The Commission should, in a timely manner, inform the third country or international organisation of the reasons and enter into consultations with it in order to remedy the situation<sup>4</sup>.

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<sup>2</sup> DE, supported by NL, proposes that the list of checks in Article 42(2) should include a new component consisting of the participation of third states or international organisations in international data-protection systems (e.g. APEC and ECOWAS). According to the position of DE, although those systems are still in the early stages of practical implementation, the draft Regulation should make allowance right away for the significance they may gain in future. Point (d) of Article 41(2) requires the systems to be fundamentally suited to ensuring compliance with data protection standards.

<sup>3</sup> FR thought this concept needed to be clarified.

<sup>4</sup> Further to DE proposal. COM scrutiny reservation.

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 safeguards should ensure compliance with data protection requirements and the rights of the data subjects, including the right to obtain effective administrative or judicial redress. They should relate in particular to compliance with the general principles relating to personal data processing, the availability of data subject's right sand of effective legal remedies and the principles of data protection by design and by default<sup>5</sup>.

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, including in a contract between the processor and another processor, nor to add other clauses or additional 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.

85) A corporate group or a group of enterprises engaged in a joint economic activity should be able to make use of approved binding corporate rules for its international transfers from the Union to organisations within the same corporate group of undertakings or group of enterprises, as long as such corporate rules include essential principles and enforceable rights to ensure appropriate safeguards for transfers or categories of transfers of personal data.

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<sup>5</sup> Further to DE and NL proposal.

86) Provisions should be made for the possibility for transfers in certain circumstances where the data subject has given his **explicit**<sup>6</sup> consent, where the transfer is necessary in relation to a contract or a legal claim, regardless of whether in a judicial procedure or whether in an administrative or any out-of-court procedure, including procedures before regulatory bodies. Provision should also be made for the possibility for transfers 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.

87) These rules should in particular apply to data transfers required and necessary for (...) reasons of public interest, for example in cases of international data exchange, either spontaneous or on request, between competition authorities, between tax or customs administrations, between financial supervisory authorities, between services competent for social security matters or for public health, **for example in case of contact tracing for contagious diseases**<sup>7</sup>, or between competent authorities<sup>8</sup>. 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 **vital interests, including physical integrity or**<sup>9</sup> life, if the data subject is incapable of giving consent. In the absence of an adequacy decision or of appropriate safeguards, Union law or Member State law may, for important reasons of public interest, expressly prohibit the controller or processor to transfer personal data to a third country or an international organisation.

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<sup>6</sup> DE proposal.

<sup>7</sup> Clarification further to FR remark.

<sup>8</sup> Deleted further to DK, DE and SI suggestion.

<sup>9</sup> Further to HR suggestion, supported by SI.

88) Transfers which cannot be qualified as large scale or frequent, could also be possible for the purposes of the legitimate interests pursued by the controller or the processor, when those interests are not overridden by the interests or rights and freedoms of the data subject and when the controller or the processor has 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. To assess whether a transfer is large scale or frequent the amount of personal data and number of data subjects should be taken into account and whether the transfer takes place on an occasional or regular basis.

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 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.

90) Some third countries enact laws, regulations and other legislative instruments which purport to directly regulate data processing activities of natural and legal persons under the jurisdiction of the Member States. The extraterritorial application of these laws, regulations and other legislative instruments may be in breach of international law and may impede the attainment of the protection of individuals guaranteed in the Union by this Regulation. Transfers should only be allowed where the conditions of this Regulation for a transfer to third countries are met. This may inter alia be the case where the disclosure is necessary for an important ground of public interest recognised in Union law or in a Member State law to which the controller is subject. (...).

91) When personal data moves across borders outside the Union it may put at increased risk the ability of individuals to exercise data protection rights in particular to protect themselves from the unlawful use or disclosure of that information. At the same time, supervisory authorities may find that they are unable to pursue complaints or conduct investigations relating to the activities outside their borders. Their efforts to work together in the cross-border context may also be hampered by insufficient preventative or remedial powers, inconsistent legal regimes, and practical obstacles like resource constraints. Therefore, there is a need to promote closer co-operation among data protection supervisory authorities to help them exchange information and carry out investigations with their international counterparts. For the purposes of developing international co-operation mechanisms to facilitate and provide international mutual assistance for the enforcement of legislation for the protection of personal data, the Commission and the supervisory authorities should exchange information and cooperate in activities related to the exercise of their powers with competent authorities in third countries, based on reciprocity and in compliance with the provisions of this Regulation, including those laid down in Chapter V.

107) At Union level, a European Data Protection Board should be set up. It should replace the Working Party on the Protection of Individuals with Regard to the Processing of Personal Data established by Directive 95/46/EC. It should consist of a head<sup>10</sup> of a supervisory authority of each Member State and of the European Data Protection Supervisor. The Commission should participate in its activities without voting rights. The European Data Protection Board should contribute to the consistent application of this Regulation throughout the Union, including by advising the Commission, in particular on the level of protection in third countries or international organisations, and promoting co-operation of the supervisory authorities throughout the Union. The European Data Protection Board should act independently when exercising its tasks.

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<sup>10</sup> BE thought allowance should be made for a representative to replace the head of the DPA.

*Article 4*  
*Definitions*

For the purposes of this Regulation:

(17) 'binding corporate rules' means personal data protection policies which are adhered to by a controller or processor established on the territory of a Member State of the Union for transfers or a set of transfers of personal data to a controller or processor in one or more third countries within a group of undertakings<sup>11</sup>;

(21) 'international organisation' means an organisation and its subordinate bodies governed by public international law or any other body which is set up by, or on the basis of, an agreement between two or more countries<sup>12</sup>;

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<sup>11</sup> NL scrutiny reservation. DE wondered whether BCRs could also cover intra-EU data transfers.

<sup>12</sup> PL reservation. NL queried whether MOUs would also be covered by this definition; FR queried whether Interpol would be covered. CZ and LV thought this definition was incomplete and should either be supplemented or deleted. DK, SI and SE pleaded in favour of its deletion.



# CHAPTER V

## TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES OR INTERNATIONAL ORGANISATIONS<sup>13 14 15 16</sup>

### *Article 40*

#### *General principle for transfers*

(...)<sup>17</sup>

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- <sup>13</sup> In light of the fact that the public interest exception would in many cases be the main ground warranting an international transfer of personal data, some delegations (CZ, DE, CZ, LV, UK) queried whether the 'old' adequacy principle/test should still be maintained and set out in such detail, as it would in practice not be applied in that many cases. DE in particular thought that the manifold exceptions emptied the adequacy rule of its meaning. Whilst they did not disagree with the goal of providing protection against transfer of personal data to third countries, it doubted whether the adequacy principle was the right procedure therefore, in view of the many practical and political difficulties (the latter especially regarding the risk of a negative adequacy decision, cf. DE, FR, UK). The feasibility of maintaining an adequacy-test was also questioned with reference to the massive flows of personal data in the context of cloud computing: BG, DE, FR, IT, NL, SK and UK. Also FR asked COM to clarify whether a transfer of data in the context of cloud computing constitutes an international transfer of data. DE also thought that the Regulation should create a legal framework for 'Safe Harbor-like' arrangements under which certain guarantees to which companies in a third country have subscribed on a voluntary basis are monitored by the public authorities of that country. The applicability to the public sector of the rules set out in this Chapter was questioned (EE), as well as the delimitation to the scope of proposed Directive (FR). The impact of this Chapter on existing Member State agreements was raised by several delegations (FR, PL).
- <sup>14</sup> NL and UK pointed out that under the 1995 Data Protection Directive the controller who wants to transfer data is the first one to assess whether this is possible under the applicable (EU) law and they would like to maintain this basic principle, which appears to have disappeared in the Commission proposal.
- <sup>15</sup> DE asked which law would apply to data transferred to third countries; notably whether this would be EU law in accordance with Article 3(2).
- <sup>16</sup> DE made a proposal for new Article 42a and the expansion of Article 44: 12884/13 DATAPROTECT 117 JAI 689 MI 692 DRS 149 DAPIX 103 FREMP 116 COMIX 473 CODEC 186. PL expressed its support for this idea.
- <sup>17</sup> GR, SE, NL and UK pointed out that this article has no added value to the rest of the Chapter V and it has therefore been deleted. BE, supported by FI and NL, thought that the requirements regarding onward transfer need not be mentioned here, as these were at any rate subsumed under the adequacy requirement. FR thought the requirement of prior originator consent to onward transfer should be expressed in a different manner. ES was opposed to putting the processor and controller on the same footing, and DE scrutiny reservation. COM scrutiny reservation, in particular regards onward transfers.

*Article 41*  
***Transfers with an adequacy decision***<sup>18</sup>

1. A transfer of personal data to a recipient or recipients<sup>19</sup> a third country or an international organisation may take place where the Commission<sup>20</sup> has decided that the third country, or a territory or a processing sector<sup>21</sup> within that third country, or the international organisation in question ensures an adequate level of protection. Such transfer shall not require any specific authorisation.
  
2. When assessing the adequacy of the level of protection, the Commission shall, in particular, take account of<sup>22</sup> the following elements:
  - (a) the rule of law, respect for human rights<sup>23</sup> and fundamental freedoms, relevant legislation (...), data protection rules and security measures, including rules for onward transfer of personal data to another third country or international organisation, which are complied with in that third country or international organisation, as well as the existence of effective and enforceable data subject rights and effective administrative and judicial redress for data subjects whose personal data are being transferred (...)<sup>24</sup>;

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<sup>18</sup> AT, LU and FR expressed their support for maintaining the adequacy procedure. Some delegations raised concerns on the time taken up by adequacy procedures. LV thought a separate paragraph setting.

<sup>19</sup> BE, IT, SI and PL have expressed scrutiny reservation so as to clarify that transfers of personal data to third countries are also covered in case where the international transfer is not to a 'recipient', but e.g. to a processor.

<sup>20</sup> CZ and SI reservation on giving such power to the Commission. NL and UK indicated that on this point the proposal seemed to indicate a shift from the 1995 Data Protection Directive, which put the responsibility for assessing a third country's data protection legislation in the first place with the controller who wanted to transfer personal data. UK had considerable doubts on the feasibility of the list in paragraph 2.

<sup>21</sup> FR, IT, SK and AT reservation.

<sup>22</sup> BE and IT thought the list should not be exhaustive and therefore proposed adding 'in particular'.

<sup>23</sup> GR, AT and SK thought a reference to human rights should be inserted.

<sup>24</sup> COM scrutiny reservation.

- (b) the existence and effective functioning of one or more independent supervisory authorities<sup>25</sup> in the third country, or to which an international organisation is subject, with responsibility for ensuring compliance with the data protection rules including adequate sanctioning powers<sup>26</sup> for assisting and advising the data subjects in exercising their rights and for co-operation with the supervisory authorities of the Union and of Member States;
- (c) the international commitments the third country or international organisation concerned has entered into<sup>27</sup>, **or other legal obligations arising from its participation in multilateral or regional systems**<sup>28</sup>, in particular in relation to the protection of personal data<sup>29</sup>.

**2a. For the assessment of the adequacy of the level of protection in a third country or international organization the European Data Protection Board shall give the Commission an opinion on the level of protection in that third country or the international organization.**

<sup>25</sup> NL queried how strict this independence would need to be assessed. BE suggested adding a reference to independent judicial authorities, FI suggested to refer to 'authorities' *tout court*. ES was opposed to the inclusion of a formal requirement for third countries of having a DPA and suggested drawing inspiration from the language used in the Opinion WP 12 of the Article 29 Working Party, which refers to “some sort of institutional mechanism allowing independent investigation of complaints”, and to the fact that “the existence of effective and dissuasive sanctions can play an important in ensuring respect for rules, as of course can systems of direct verification by authorities, auditors, or independent data protection officials”.

<sup>26</sup> DE proposal. ES reservation.

<sup>27</sup> CZ, CH and NL remarked that many of these elements need to be formulated less broadly. DE thought this was an important element.

<sup>28</sup> DE proposal; however such participation should not automatically entail an adequacy decision. DE proposed that the list of checks in Article 42(2) should include a new component consisting of the participation of third States or international organisations in international data-protection systems (e.g. APEC and ECOWAS). It also suggested referring to 'ways of ensuring consistent interpretation and application of the data-protection provisions under Articles 55 et seq'.

<sup>29</sup> According to COM this is mainly the CoE Convention No 108. DE proposed that the list of checks in Article 42(2) should include a new component consisting of the participation of third States or international organisations in international data-protection systems (e.g. APEC and ECOWAS). It also suggested referring to 'ways of ensuring consistent interpretation and application of the data-protection provisions under Articles 55 et seq'.

3. The Commission, after assessing the adequacy<sup>30</sup> of the level of protection, may decide that a third country, or a territory or a processing sector within that third country, or an international organisation ensures an adequate level of protection within the meaning of paragraph 2. (...) <sup>31</sup>. The implementing act shall specify its territorial and sectoral application and, where applicable<sup>32</sup>, identify the supervisory authority mentioned in point (b) of paragraph 2. The implementing act shall be adopted in accordance with the examination procedure<sup>33</sup> referred to in Article 87(2)<sup>34</sup>.

3a. Decisions adopted by the Commission on the basis of Article 25(6) (...) <sup>35</sup> of Directive 95/46/EC shall remain in force until amended, replaced or repealed by the Commission<sup>36</sup> **in accordance with the examination procedure referred to in Article 87(2)**<sup>37</sup>.

4. (...)

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<sup>30</sup> CZ, RO and SI reservation on giving such power to the Commission. DE thought that stakeholders should be involved in this process. NL and UK indicated that on this point the proposal seemed to indicate a shift from the 1995 Data Protection Directive, which put the responsibility for assessing a third country's data protection legislation in the first place with the controller who wanted to transfer personal data.

<sup>31</sup> CZ, DE DK, HR, IT, NL, PL, SK and RO thought an important role should be given to the EDPB in assessing these elements. COM has pointed out that there can be no additional step in the Comitology procedure, in order to be in line with the Treaties and Regulation 182/2011.

<sup>32</sup> BE suggested deleting 'where applicable'.

<sup>33</sup> BE, SI and LU queried whether Member States would initiate such procedure.

<sup>34</sup> DE queried the follow-up to such decisions and warned against the danger that third countries benefiting from an adequacy decision might not continue to offer the same level of data protection. COM indicated there was monitoring of third countries for which an adequacy decision was taken.

<sup>35</sup> The reference to Article 26(4) has been moved to Article 42(5b).

<sup>36</sup> Moved from paragraph 8. CZ and AT thought an absolute time period should be set. NL, PT and SI thought this paragraph 8 was superfluous or at least unclear. Also RO thought that, if maintained, it should be moved to the end of the Regulation.

<sup>37</sup> DE and ES suggested to request the Board for an opinion. COM has pointed out that there can be no additional step in the Comitology procedure, in order to be in line with the Treaties and Regulation 182/2011.

- 4a. The Commission shall monitor the functioning of decisions adopted pursuant to paragraph 3 and decisions adopted on the basis of Article 25(6) or Article 26(4) of Directive 95/46/EC.
5. The Commission may decide that a third country, or a territory or a processing sector within that third country, or an international organisation no longer<sup>38</sup> ensures an adequate level of protection within the meaning of paragraph 2 and may, where necessary, repeal, amend or suspend such decision without retro-active effect. The implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2) or, in cases of extreme urgency (...), in accordance with the procedure referred to in Article 87(3).
6. A decision pursuant to paragraph 5 is without prejudice to transfers of personal data to the third country, or the territory or (...) processing sector within that third country, or the international organisation in question pursuant to Articles 42 to 44. (...) <sup>39</sup>. The Commission shall enter into consultations with the third country or international organisation with a view to remedying the situation giving rise to the Decision made pursuant to paragraph 5<sup>40</sup>.
7. The Commission shall publish in the *Official Journal of the European Union* a list of those third countries, territories and processing sectors within a third country and international organisations in respect of which decisions have been taken pursuant to paragraphs 3 and 5.
8. (...) <sup>41</sup>

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<sup>38</sup> COM reservation on the deletion of its possibility to adopt negative adequacy decisions.

<sup>39</sup> Deleted further to remarks by CZ, DE, GR and RO.

<sup>40</sup> DE and CZ asked for the deletion of paragraph 6. DK thought it was unclear at which exact moment third countries should be consulted.

<sup>41</sup> Moved to paragraph 3a.

Article 42

***Transfers by way of appropriate safeguards***<sup>42</sup>

1. Where **the transfer is not based on a** decision pursuant to **paragraph 3 of** Article 41, a controller or processor may transfer personal data to a recipient or recipients<sup>43a</sup> third country or an international organisation only if the controller or processor has adduced appropriate safeguards *in a legally binding instrument* with respect to the protection of personal data or where the controller or the processor has obtained prior authorisation for the transfer by the supervisory authority in accordance with paragraph 2a<sup>44</sup>.
  
2. The appropriate safeguards referred to in paragraph 1 ***may*** be provided for, in particular<sup>45</sup>, by:
  - (a) binding corporate rules referred to in Article 43; or
  - (b) standard data protection clauses adopted by the Commission (...) in accordance with the examination procedure referred to in Article 87(2)<sup>46</sup>; or
  - (c) standard data protection clauses adopted by a supervisory authority in accordance with the consistency mechanism referred to in Article 57 and adopted by the Commission pursuant to the examination procedure referred to in Article 87(2).
  - (d) contractual clauses between the controller or processor and the recipient of the data<sup>47</sup> (...);or

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<sup>42</sup> Several delegations (BE, CH, IT) thought this article (in particular paragraphs 2 (a + b) and 5 should also be applied to public authorities; UK expressed concerns regarding the length of authorisation procedures and the burdens these would put on DPA resources. The use of this procedures regarding data flows in the context of cloud computing was also questioned. PL thought this article should be integrated into Article 44, as one of the derogations.

<sup>43</sup> PL and SK suggested deletion of reference to recipients

<sup>44</sup> FI proposal, supported by CZ, CY, NL and RO.

<sup>45</sup> COM emphasised the non-exhaustive nature of this list, clarifying that also other types of agreements could be envisaged.

<sup>46</sup> FR reservation on the possibility for COM to adopt such standard clauses.

<sup>47</sup> BE scrutiny reservation; it proposed referring to a sub-processor. ES proposed linking this to the absence of the appointment of a data protection officer.

- (e) an approved code of conduct pursuant to Article 38<sup>48</sup>; or
- (f) a certification mechanism pursuant to Article 39<sup>49</sup> <sup>50</sup>;
- (g) **provisions to be inserted into administrative arrangements<sup>51</sup> providing the basis for a transfer.**

2a. A transfer based on **the safeguards in a legally binding instrument** referred to in points (a) to (c) of paragraph 2 shall not require any specific authorisation from a supervisory authority. For any other transfer or category of transfers by way of appropriate safeguards the controller or processor shall obtain prior authorisation from the competent supervisory authority.

3. (...)

4. (...)

5a. If the transfer referred to in **point (d) of paragraph 2** is related to processing activities which concern data subjects in several Member States, or may substantially affect the free movement of personal data within the Union, the supervisory authority shall apply the consistency mechanism referred to in Article 57.

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<sup>48</sup> COM, BE, CY, FR, FI and IT scrutiny reservation. RO reservation.

<sup>49</sup> COM, CY, FR and BE scrutiny reservation. RO reservation. ES thought it convenient to clarify in a recital that these safeguards must have the same extent as the ones provided by other instruments. We must take into account that, unlike the rest of the instruments, codes of conduct and certifications do not have a contractual (therefore, bilateral) nature.

<sup>50</sup> NL proposed adding a point on 'mutually binding obligations of professional secrecy or existing sectoral legislation which offers special protection to the interests of data subject between the controller or processor and the recipient of the data in the third country, territory or processing sector thereof or international organisation'.

<sup>51</sup> PL scrutiny reservation. SI thought that it should be clarified in a recital whether this refers to an MOU and is applicable only to public controllers.

- 5b. *Authorisations by a Member State or supervisory authority on the basis of Article 26(2) of Directive 95/46/EC shall remain valid until amended, replaced or repealed by that supervisory authority<sup>52</sup>. Decisions adopted by the Commission on the basis of Article 26(4) of Directive 95/46/EC shall remain in force until amended, replaced or repealed by the Commission<sup>53</sup> **in accordance with the examination procedure referred to in Article 87(2)**<sup>54</sup>.*

*Article 43*

***Binding corporate rules***<sup>55</sup>

1. The competent supervisory authority shall *approve*<sup>56</sup> *binding corporate rules* in accordance with the consistency mechanism set out in Article 57 provided that they:
- (a) are legally binding and apply to, and are enforced by, every member concerned of the group of undertakings or group of enterprises engaged in a joint economic activity<sup>57</sup> <sup>58</sup>;

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<sup>52</sup> PL scrutiny reservations. UK and ES disagreed with the principle of subjecting non-standardised contracts to prior authorisation by DPAs. It was thought that this was contrary to the principle of accountability. AT, PL, GR, SI and BG voiced concerns regarding the possibility to transfer personal data in the absence of a legally binding instrument. IT scrutiny reservation; BE supports this and would be against a deadline after which the authorisations given would automatically not be valid anymore. DE emphasised the need of monitoring.

<sup>53</sup> Moved from paragraph 8. CZ and AT thought an absolute time period should be set. NL, PT and SI thought this paragraph 8 was superfluous or at least unclear. Also SK and RO thought that, if maintained, it should be moved to the end of the Regulation.

<sup>54</sup> DE and ES had suggested to request the Board for an opinion. COM has pointed out that there can be no additional step in the Comitology procedure, in order to be in line with the Treaties and Regulation 182/2011.

<sup>55</sup> Several delegations supported this innovative legal technique: BE, CZ, DE, ES, FR, FI, IT, LU, NL, PL, PT and SK. NL thought it should be given a wider scope. BE and NL pointed to the need for a transitional regime allowing to 'grandfather' existing BCRs. NL and GR pleaded in favour of covering data flows in the context of cloud computing and ES thought more flexibility should be provided in this way. NL asked whether the BCRs should also be binding upon employees. SI thought BCRs should also be possible with regard to some public authorities, but COM stated that it failed to see any cases in the public sector where BCRs could be applied.

<sup>56</sup> DE and UK expressed concerns on the lengthiness and cost of such approval procedures. The question was raised which DPAs should be involved in the approval of such BCRs in the consistency mechanism.

<sup>57</sup> COM, IT and UK scrutiny reservation on 'group of enterprises engaged in a joint economic activity' extending the scope beyond one group of undertakings. DE and SK thought this requires a definition. BE proposed to refer to processors; ES proposed to insert a reference (in paragraph 1(a) as well as in (2)(f)(h)(i) and (k) to 'business partners'.

<sup>58</sup> BE wonders why the reference to controller's or processor's group of undertakings is deleted under point 1.a) and wants to support the possibility of approval of Processor's BCR.



- (b) expressly confer enforceable rights on data subjects with regard to the processing of their personal data<sup>59</sup>;
  - (c) fulfil the requirements laid down in paragraph 2.
2. The binding corporate rules referred to in paragraph 1 shall contain a description of<sup>60</sup> at least the following elements:
- (a) the structure and contact details of the *concerned* group and of each of its members<sup>61</sup>;
  - (b) the data transfers or categories of transfers, including the types of personal data, the type of processing and its purposes, the type of data subjects affected and the identification of the third country or countries in question;
  - (c) their legally binding nature, both internally and externally;
  - (d) application of the general data protection principles, in particular purpose limitation, including the principle **not to process data for incompatible purposes**<sup>62</sup>, data quality, legal basis for the processing, processing of special categories of personal data, measures to ensure data security, and the requirements in respect of onward transfers to bodies (...) not bound by the binding corporate rules;
  - (e) the rights of data subjects in regard to the processing of their personal data<sup>63</sup> and the means to exercise these rights, including the right not to be subject to (...) profiling in accordance with Article 20, the right to lodge a complaint before the competent supervisory authority and before the competent courts of the Member States in accordance with Article 75, and to obtain redress and, where appropriate, compensation for a breach of the binding corporate rules;

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<sup>59</sup> FI proposed clarifying that these rights need to be enforceable in a third country and BE suggested a reference to effective administrative and judicial redress.

<sup>60</sup> Further to NL suggestion. EE scrutiny reservation. BE suggested adding ' or legal engagements'; ES suggested 'and contain'.

<sup>61</sup> BE proposed a reference to sub-processors.

<sup>62</sup> BE proposal.

<sup>63</sup> FI proposed clarifying that these rights need to be enforceable in a third country.

- (f) the acceptance by the controller or processor established on the territory of a Member State of liability for any breaches of the binding corporate rules by any member concerned not established in the Union; the controller or the processor may only be exempted from this liability, in whole or in part, on proving that that member is not responsible for the event giving rise to the damage<sup>64</sup>;
- (g) how the information on the binding corporate rules, in particular on the provisions referred to in points (d), (e) and (f) of this paragraph is provided to the data subjects in accordance with Articles 14 and 14a;
- (h) the tasks of any data protection officer designated in accordance with Article 35 **or any other person or entity in charge of the**<sup>65</sup> monitoring (...) compliance with the binding corporate rules within the group, as well as monitoring the training and complaint handling;
- (hh) the complaint procedures;
- (i) the mechanisms within the group (...) for ensuring the verification of compliance with the binding corporate rules, **in particular data protection audits that includes appropriate measures to ensure compliance with this Regulation. Results of such verification should be communicated to the person or entity referred under point h), to the board of the controlling undertaking and to the controller or processor referred to in point (f), and should be available upon request to the competent supervisory authority**<sup>66</sup>;
- (j) the mechanisms for reporting and recording changes to the rules and reporting these changes to the supervisory authority;
- (k) the co-operation mechanism with the supervisory authority to ensure compliance by any member of the group (...), in particular by making available to the supervisory authority the results of (...) verifications of the measures referred to in point (i) of this paragraph<sup>67</sup>;

<sup>64</sup> De thought that the reference to exemptions should be deleted here.

<sup>65</sup> BE proposal: BE wants to avoid that the reference to art. 35 would make the monitoring of the BCR facultative while today it is mandatory.

<sup>66</sup> BE proposal; NL also proposed referring to auditing as an example.

<sup>67</sup> BE suggested making this more explicit in case of a conflict between the 'local' legislation applicable to a member of the group and the BCR.

- (l) the mechanisms for reporting to the supervisory authority any legal requirements to which a member of the group is subject in a third country which are likely to have a substantial adverse effect on the guarantees provided by the binding corporate rules<sup>68</sup>; and
- (m) the appropriate data protection training to personnel having permanent or regular access to personal data or involved in the development of tools used to process personal data<sup>69</sup>.

2a The Data Protection Board shall advise the Commission on the format and procedures for the exchange of information between controllers, processors and supervisory authorities for binding corporate rules.

- [3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for binding corporate rules within the meaning of this Article, in particular as regards the criteria for their approval, the application of points (b), (d), (e) and (f) of paragraph 2 to binding corporate rules adhered to by processors and on further necessary requirements to ensure the protection of personal data of the data subjects concerned.]<sup>70</sup>
- 4. The Commission may specify the format and procedures for the exchange of information (...) between controllers, processors and supervisory authorities for binding corporate rules within the meaning of this Article. Those implementing acts shall be adopted in accordance with the examination procedure set out in Article 87(2).

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<sup>68</sup> DE proposal; this would allow the DPOA to decide whether to withdraw the authorisation.

<sup>69</sup> BE proposal: BE want to include a clearer reference to programme of training in order to meet the current standards applicable for BCRs.

<sup>70</sup> CZ, IT, SE and NL reservation. FR scrutiny reservation regarding (public) archives. RO and HR thought the EDPB should be involved.

*Article 44*  
***Derogations for specific situations***<sup>71</sup>

1. In the absence of an adequacy decision pursuant to **paragraph 5 of** Article 41 of appropriate safeguards pursuant to Article 42<sup>72</sup>, **including binding corporate rules**<sup>73</sup> a transfer or a category of transfers<sup>74</sup> of personal data to a recipient or recipients in a third country or an international organisation may take place only on condition that:
- (a) the data subject has explicitly<sup>75</sup> consented to the proposed transfer, after having been informed that such transfers may pose<sup>76</sup> risks 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 reasons of public interest<sup>77</sup>; or
  - (e) the transfer is necessary for the establishment, exercise or defence of legal claims<sup>78</sup>; or

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<sup>71</sup> EE and NL reservation. NL parliamentary reservation. CZ, EE and UK and other delegations that in reality these 'derogations' would become the main basis for international data transfers and this should be acknowledged as such by the text of the Regulation.

<sup>72</sup> BE and LU proposed adding a reference to BCRs.

<sup>73</sup> Further to LU proposal.

<sup>74</sup> PL reservation on the term 'set of transfers'.

<sup>75</sup> DE proposal.

<sup>76</sup> Further to CZ proposal. IE preferred the original COM text.

<sup>77</sup> The word 'important' was deleted further to remarks by ES, FR and SI. COM reservation on this change. DE remarked that the effects of (d) in conjunction with paragraph 5 need to be examined, in particular with respect to the transfer of data on the basis of court judgments and decisions by administrative authorities of third states, and with regard to existing mutual legal assistance treaties. IT reservation on the (subjective) use of the concept of public interest. IT thought that also here it should be clarified that this ground cannot justify massive and structural transfers of data. PT proposed adding 'fundamental' before 'public interest'; RO also thought it was worded too broadly. HR suggested adding 'which is not overridden by the legal interest of the data subject'. IT reservation on this ground.

<sup>78</sup> PL and SK requested clarification on this subparagraph. ES suggested adding that this applied regardless of whether these claims were exercised in a judicial procedure or whether in an administrative or any out-of-court procedure.

- (f) the transfer is necessary in order to protect the vital of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent<sup>79</sup>; 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 a legitimate interest but only to the extent that the conditions laid down in Union or Member State law for consultation are fulfilled in the particular case<sup>80, 81</sup> or
- (h) the transfer *which is not large scale or frequent*<sup>82</sup>, is necessary for the purposes of legitimate interests pursued by the controller or the processor<sup>83</sup> which are not overridden by the interests or rights and freedoms of the data subject 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 suitable safeguards with respect to the protection of personal data<sup>84 85</sup>.

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<sup>79</sup> This may also cover public health emergency situations. BE though there was a need for a separate point on this. FR wondered whether this paragraph allowed to cover the so-called contact tracing in case of contagious diseases.

<sup>80</sup> FI requested clarification of this subparagraph; SK asked for its deletion; IE and SI scrutiny reservation.

<sup>81</sup> The Commission was requested to explain the purpose of this provision.

<sup>82</sup> BE, DE, ES and SK scrutiny reservation; they thought the terms 'frequent or massive' are unclear. BE queried whether it implied that this derogation could not be used by public authorities for frequent, but case-by-case transfers of personal data (e.g. in the context of social security). LU thought it might be used to widely and ES and UK advocated its deletion, which was opposed by FR. DE thinks there is danger that point (h) evolves into a 'super derogation' and therefore proposed to revert the balancing of interest and demand an overriding interest of the controller. DE, supported by SI, also proposed to refer to 'overwhelming legitimate interest'.

<sup>83</sup> FR requests clarification concerning the concept of "legitimate interest(s)" and would like the balance of Directive 95/46 to be preserved. It scrutiny reservation. AT, PT and PL are opposed to this subparagraph and plead in favour of its deletion.

<sup>84</sup> RO and IT reservation: IT, supported by CY, FR, RO and PL suggested deleting the words 'where necessary'. AT and NL reservation: it was unclear how this reference to appropriate safeguards relates to appropriate safeguards in Article 42.

<sup>85</sup> NL, supported by DE, proposed adding a point on prior authorisation pursuant to Article 34. Also HU, supported by LV, could accept if only if subject to prior approval by a DPA.

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. (...)
4. Points (a), (b), (c) and (h)<sup>86</sup> of paragraph 1 shall not apply to activities carried out by public authorities in the exercise of their public powers<sup>87</sup>.
5. The public interest referred to in point (d) of paragraph 1 must be recognised in Union law or in the national law of the Member State to which the controller is subject. Union law or Member State law may, for important reasons of public interest, expressly prohibit the controller or processor to transfer personal data to a third country or an international organisation<sup>88</sup>.
6. The controller or processor shall document the assessment as well as the suitable safeguards (...) referred to in point (h) of paragraph 1 in the records referred to in Article 28 (...) <sup>89</sup>.
- 6a. (...) <sup>90</sup>
7. (...).

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<sup>86</sup> NL proposal, supported by DE. DE is of the opinion that public entities should be exempted 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.

<sup>87</sup> BE scrutiny reservation.

<sup>88</sup> NL proposal, supported by CY, DE and PL. BE, ES, IE, LU, SE, SI and UK scrutiny reservation; several delegations were unclear regarding the exact nature of the proposed legislative power.

<sup>89</sup> GR suggested deleting this paragraph in view of the administrative burden entails. SK thought this general requirement did not need repeating here. IT wanted to clarify the notification took place before the transfer.

<sup>90</sup> At the suggestion of FR, para. 6a was turned into a separate Article 89a.

*Article 45*

***International co-operation for the protection of personal data***<sup>91</sup>

1. In relation to third countries and international organisations, the Commission and supervisory authorities shall take appropriate steps to:
  - (a) develop international co-operation mechanisms to facilitate the *effective* enforcement of legislation for the protection of personal data;
  - (b) provide international mutual assistance in the enforcement of legislation for the protection of personal data, including through (...) complaint referral, investigative assistance and information exchange, subject to appropriate safeguards for the protection of personal data and other fundamental rights and freedoms<sup>92</sup>;
  - (c) engage relevant stakeholders in discussion and activities aimed at promoting international co-operation in the enforcement of legislation for the protection of personal data;
  - (d) promote the exchange and documentation of personal data protection legislation and practice.
  
2. (...)

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<sup>91</sup> PL thought (part of ) Article 45 could be inserted into the preamble. NL, RO and UK also doubted the need for this article in relation to adequacy and thought that any other international co-operation between DPAs should be dealt with in Chapter VI. NL thought this article could be deleted.

<sup>92</sup> AT and FI thought this subparagraph was unclear and required clarification.