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WP 241**

Opinion 04/2016 on European Commission amendments proposals related to the powers of Data Protection Authorities in Standard Contractual Clauses and adequacy decisions

Adopted on 31 October 2016

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

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Website: http://ec.europa.eu/justice/data-protection/index_en.htm

I. Introduction

On 14 October 2016, the Article 29 Working party was consulted as a matter of urgency by the European Commission on two draft implementing Decisions as it intends to submit those Decisions to the Article 31 Committee in the very near future. The WP29 has been asked to consider:

- 1 Draft Commission Decision amending Commission Decisions 2001/497/EC and 2010/87/EU on standard contractual clauses for the transfer of personal data to third countries and to processors established in such countries, under Directive 95/46/EC of the European Parliament and of the Council (hereinafter: “draft decision on standard contractual clauses”).
- 2 Draft Commission Decision amending Commission Decisions 2000/518/EC,

2002/2/EC, 2003/490/EC, 2003/821/EC, 2004/411/EC, 2008/393/EC, 2010/146/EU, 2010/625/EU, 2011/61/EU, 2012/484/EU, 2013/65/EU on the adequate protection of personal data by certain countries, pursuant to Article 25(6) of Directive 95/46/EC of the European Parliament and of the Council (hereinafter: “draft decision on adequacy”);

As a general remark, the Working Party regrets the very short deadline given by the European Commission to analyse these draft decisions especially as the proposed amendments directly concern the powers of Data Protection Authorities (“DPAs”) under Adequacy decisions and Standard Contractual Clauses approved by the European Commission.

According to the Article 30.1.c of EC Directive 95/46/EC, the Article 29 Working party is competent to advise the Commission on any proposed Community measures affecting rights and freedoms of natural persons. As the proposed modifications directly address the powers of DPAs as referred to in article 28.3 of EC Directive 95/46/EC, it may affect rights and freedoms of natural persons and the Article 29 Working party welcomes this consultation.

According to Recital 7 of the draft Commission Decisions, the purpose of the proposed modifications is to ensure the “full implementation” of the European Court of Justice (“CJEU”) judgement in Case C-362/14 Maximilian Schrems v Data Protection Commissioner (hereunder, “Case C-362/14 CJEU judgement”) for the listed existing Commission implementing decisions based on articles 25.6 and 26.4 of EC Directive 95/46/EC.

In Case C-362/14 CJEU judgement, the Court annulled article 3 of the Safe Harbor decision 2000/520/EC because the Commission lacked competence to restrict the national supervisory authorities’ powers derived from Article 28 of Directive 95/46. The article 3.1.b of Safe Harbor decision imposed four cumulative conditions for the DPAs’ intervention. The Court considered such conditions as “*restrictive conditions establishing a high threshold for intervention*” which was understood by the Court as denying the

powers of the national supervisory authorities which derive from Article 28 of Directive 95/46 to ensure compliance with article 25 of EC Directive 95/46/EC¹.

The opinion of the General advocate was more detailed: *“As the Belgian and Austrian Governments submitted, in essence, at the hearing, the emergency exit that Article 3(1)(b) of Decision 2000/520 represents is so narrow that it is difficult to put into practice. It imposes cumulative criteria and sets the bar too high. In the light of Article 8(3) of the Charter, it is not possible for the national supervisory authorities’ scope for manoeuvre in relation to the powers resulting from Article 28(3) of Directive 95/46 to be limited in such a way that they can no longer be exercised.”*

The cumulative aspect of the conditions was in any case creating a particular burden, but this was particularly true in relation to one of the conditions where it was difficult (almost impossible) to assess whether *“the continuing transfer would create an imminent risk of grave harm to data subjects”*², especially in the framework of secret surveillance activities.

The Court of Justice also annulled article 1 of the Safe Harbor Decision 2000/520/EC as that the Commission did not state that the *“United States in fact ‘ensures’ an adequate level of protection by reason of its domestic law or its international commitments”*³. In particular, the Decision 2000/520/EC did not contain *“any finding regarding the existence, in the United States, of rules adopted by the State intended to limit any interference with the fundamental rights of the persons whose data is transferred from the European Union to the United States, interference which the State entities of that country would be authorised to engage in when they pursue legitimate objectives, such as national security. Nor does Decision 2000/520 refer to the existence of effective legal protection against interference of that kind”*⁴.

II. Scope of the opinion

As the Working Party 29 understands that the European Commission intends to submit the draft Decisions to the Article 31 Committee imminently, this analysis focuses on the current proposal to amend article 3 of the Adequacy Decisions and article 4 of the Decisions on standard contractual clauses.

The Working Party 29 however notes that the Court of Justice stated that: *“in order for the Commission to adopt a decision pursuant to Article 25(6) of Directive 95/46, it must*

¹ See §§ 101-104 of Case C-362/14 CJEU judgement. Reference to article 25 here depends on the subject matter of the Case C-362/14 CJEU judgement and of course, it could not be understood as limiting the scope of application of article 28.

² See article 3.1.b of the annulled decision 2000/5220/EC on Safe Harbor.

³ See paragraph 97 of Case C-362/14 CJEU judgement.

⁴ See paragraphs 88 and 89 of Case C-362/14 CJEU judgement.

*find, duly stating reasons, that the third country concerned in fact ensures, by reason of its domestic law or its international commitments, a level of protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order*⁵”. In this particular regard, it is incumbent to the European Commission to provide for such findings in its adequacy decisions⁶. **The WP29 regrets that the Commission, in its draft decisions which are subject to the present consultation, only partially addresses the Court decision** by focusing on the implementation of the reasoning related to the annulment of article 3 of the Decision 2000/520/EC and by not addressing the arguments in relation to the annulment of its article 1.

In particular, the Working Party 29 regrets that the Commission has not carried out an in-depth assessment of the conditions under which public authorities in the third countries concerned access personal data transferred on the basis of the relevant decisions on adequacy. In this context, the WP29 notes that the current decisions on adequacy concern, in particular, the level of protection of personal data provided by the Canadian Personal Information Protection and Electronic Documents Act, as well as countries including Switzerland, Argentina, the State of Israel, the Eastern Republic of Uruguay and New Zealand. **In order to ensure their compliance with the fundamental rights to respect for private life and protection of personal data, the Working Party 29 insists that the draft decisions on adequacy must assess whether public authorities of these third countries responsible for national security, law enforcement or other public interests do not interfere with the rights of individuals to privacy and to protection of their personal data beyond what is strictly necessary, and that there is effective legal protection against such interferences.** The assessment made by the Commission as to the compliance with this requirement does not seem sufficient to meet the requirements stated by the CJEU in the Case C-362/14⁷ and could jeopardize their legal validity possibly leading to a referral to a competent Court. **The Working Party 29**

⁵ Paragraph 96 of Case C-362/14 CJEU judgement.

⁶ In this regard, the Working Party 29 underlines that assessments of the level of adequacy were made, until recently, on the basis of detailed reports established by external experts appointed by the European Commission. The Working Party consequently strongly recommends that the European Commission provides extensive adequacy reports as basis of its decisions and resumes its previous practice to appoint external experts in charge of conducting such extensive and in-depth assessment work.

⁷ For instance, in Commission Decision of 20 December 2001 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided by the Canadian Personal Information Protection and Electronic Documents Act (notified under document number C(2001) 4539) (2002/2/EC), the only reference made to access by public authorities to data originally processed for commercial purposes appears in recital 9 which states that: “*The Canadian Act covers all the basic principles necessary for an adequate level of protection for natural persons, even if exceptions and limitations are also provided for in order to safeguard important public interests and to recognise certain information which exists in the public domain. The application of these standards is guaranteed by judicial remedy and by independent supervision carried out by the authorities, such as the Federal Privacy Commissioner invested with powers of investigation and intervention. Furthermore, the provisions of Canadian law regarding civil liability apply in the event of unlawful processing which is prejudicial to the persons concerned.*”

recommends that the Commission make this assessment as soon as possible to ensure a fully-fledged revision of those Decisions. As noted above, recital 7 of both draft decisions indicates that the proposed modifications is to ensure a “full implementation of the Schrems judgement” but instead only appear to address the conclusions of the CJEU on the powers of the national supervisory authorities and this should be made clearer in the draft decisions.

In addition, the present analysis does not cover the modifications needed to those Commission decisions in the light of the future entry into application of the General Data Protection Regulation.

III. Draft decision on standard contractual clauses

The European Commission is proposing to replace the content of Article 4 of Commission Decisions 2001/497/EC and 2010/87/EU on standard contractual clauses (hereinafter: “SCC”)⁸.

The Working Party 29 would like to underline the fact that current Article 4 of Commission Decisions 2001/497/EC and 2010/87/EU on SCC is different from the article 3 of Safe Harbor decision. Article 4 of SCC is listing alternative situations for which DPA may exercise their existing powers to prohibit or suspend data flows to third countries while Article 3.1.b of Safe Harbor adequacy decision was imposing cumulative criteria.

However, the Working Party 29 welcomes the intention of the European Commission to avoid any additional conditions which might limit the DPAs’ power of intervention.

As the Court confirmed: “*neither Article 8(3) of the Charter nor Article 28 of Directive 95/46/EC excludes from the national supervisory authorities’ sphere of competence the oversight of transfers of personal data to third countries which have been the subject of a Commission decision pursuant to Article 25(6) of Directive 95/46*”⁹. Recital 3 of the draft decision on standard contractual clauses adequately takes this into consideration.

However, recital 5 of the draft decision on standard contractual clauses is interpreting Case C-362/14 CJEU judgement and may be read as creating a duty for the supervisory authorities to always authorize transfers based on SCC. It is key to underline that the binding character does not prevent national supervisory authorities suspending or prohibiting personal data flows in order to protect rights and liberties of individuals. Therefore, **the Working party 29 suggests amending recital 5 to ensure its consistency with proposed recital 3 of the draft decision. A solution is to add the**

⁸ To delete the content of current paragraphs 1 and 2 of Article 4 of Commission Decision 2010/87/EU and paragraphs 1 to 3 of Article 4 of Decision 2001/497/EC and to modify the last paragraph of Article 4 of both Decisions.

⁹ Paragraph 54 of Case C-362/14 CJEU judgement.

following recital: *“However, neither Article 8(3) of the Charter nor Article 28 of Directive 95/46 excludes from the national supervisory authorities’ sphere of competence the oversight of transfers of personal data to third countries which have been the subject of a Commission Decision pursuant to Article 26.4 of Directive 95/46”*¹⁰.

The Working Party 29 recommends adding in the recitals examples under which DPAs may exercise their powers to prohibit or suspend data flows to third countries. According to the Working Party 29, the Case C-362/14 CJEU judgement requires the deletion of any condition which purports to restrict the power of DPAs but it does not prevent the European Commission from giving non exhaustive examples under which DPAs may exercise their powers. Those examples would be used by DPAs when exercising their competence and facilitate their work by **bringing more legal certainty.** **The European Commission gave similar clarifications in recital 60 of the Privacy Shield adequacy decision,** stating that the conditions under which a data importer handles data may also lead to violation of EU data protection law. Clarification is also needed for Decisions relating to Standard contractual clauses.

Therefore, **the Working party recommends complementing recital 3 by adding the following** : *“For instance, where a national supervisory authority, upon complaint or on its own initiative, considers that the transfer of personal data is carried out in violation of EU or national data protection law, such as when the data importer has not respected the standard contractual clauses or when the legislation applicable to the data importer imposes upon him requirements which go beyond the restrictions strictly necessary in a democratic society, it can exercise its powers vis-a-vis the data exporter and order the suspension or the ban of the data transfer.”*

IV. Draft decision on adequacy

As regards the DPAs powers, the Working Party 29 welcomes the article 1.1 of the draft decision, which acknowledges the powers of data protection authorities to suspend or ban the data flows¹¹.

Recitals 1 to 5 of the Draft decision directly refer to the Case C-362/14 CJEU judgement. Recitals 1 to 3 explain the prohibition on the European Commission restricting the DPAs powers and the fact that DPAs remain competent to oversee the transfers of personal data to a third country which has been the subject of a Commission adequacy decision. The two following recitals address the binding character of the Commission decisions and the prohibition for DPAs to adopt measures contrary to the Commission adequacy decision. There is however no further explanation on the manner those two purposes could be

¹⁰ Application *Mutatis mutandis* of the Paragraph 54 of Case C-362/14 CJEU judgement.

¹¹ Note that this comment is made on the basis of Article 1 of the draft decision on adequacy, which refers to Commission Decision 2000/518/EC on the adequacy of Switzerland, but it also applies to all other corresponding decisions under amendment.

reconciled which would assist in ensuring that the adequacy decisions are applied uniformly.

The Working Party 29 considers that there is a need to further explain how the European Court balanced the need to consider the European Commission decision as being legally binding against the necessity of preserving the powers of the DPAs¹². The Court stated that the binding character of the Commission adequacy decision is notwithstanding the right of the national supervisory authorities to engage in legal proceedings before the national courts, if they have doubts as to the validity of the Commission decision. This may then lead to a reference to the CJEU for a preliminary ruling for the purpose of examination of the decision's validity¹³. **This part is a core element of the judgement of the Court and should be explicitly incorporated in the recital of the draft decisions.**

Moreover, **the Working Party recommends clarifying that the exercise of this right to engage in legal proceedings includes the situation where the national supervisory authority considers that the data importer or any further recipient is subject to legal requirements which may interfere with the applicable data protection law in a manner which goes beyond the restrictions necessary in a democratic society as provided for in Article 13 of Directive 95/46/EC.**

Furthermore, **in the same manner recital 60 of the Privacy Shield adequacy decision gave explanations** about the powers of DPAs to suspend or prohibit data flows based on article 28.3 of the EC Directive 95/46/EC (see also above Section III), **the Working Party 29 recommends stating, as an example, that this right may be exercised where the DPA considers that the transfer of personal data is carried out in violation of EU data protection law, including when the data importer or any further recipient is not complying with the applicable standard of protection subject to the relevant adequacy decision.** The absence of a similar recital may indicate a lack of consistency across all of the relevant Commission Decisions.

As regards the duty to monitor the adequacy decisions, the Working Party 29 welcomes the recitals 8 and 9 which further explain this duty of the European Commission to monitor the findings relating to adequacy decisions and in particular the developments concerning access to personal data by public authorities. In the same manner, the Working Party 29 welcomes article 1.2 relating to this monitoring duty.

¹² Such further explanation is in particular required as to whether and, if so, to what extent DPAs are entitled at least as interim measure to order suspension or prohibition of data flows if they are of the opinion that legislation applicable to the data importer imposes upon him requirements which go beyond the restrictions strictly necessary in a democratic society (see C465/93; C143/88 and joint cases C411/10 and C493/10).

¹³ See § 65 of Case C-362/14 CJEU judgement.

Finally, the Working Party 29 would like to propose the following additional drafting recommendations:

- Under the first paragraph of article 1.2¹⁴, reference should not only be made to the legal order but also to the “*practices in the third country*”¹⁵;
- The 3rd paragraph of article 1.2¹⁶ should be modified in the following manner: “*The Member States and the Commission shall inform each other of any indications that interferences by Swiss public authorities responsible for national security, law enforcement or other public interests with the right of individuals to the protection of their personal data go beyond what is strictly necessary in a democratic society, or that there is no effective legal protection against such interferences*”.

¹⁴ Note that this comment is made on the basis of Article 1 of the draft decision on adequacy, which refers to Commission Decision 2000/518/EC on the adequacy of Switzerland, but it also applies to all other corresponding decisions under amendment.

¹⁵ Case C-362/14 CJEU judgement, para. 34, 37, 59, 66, 67.

¹⁶ Note that this comment is made on the basis of Article 1 of the draft decision on adequacy, which refers to Commission Decision 2000/518/EC on the adequacy of Switzerland, but it also applies to all other corresponding decisions under amendment.