EUROPEAN DATA PROTECTION SUPERVISOR

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(OLAF)
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PH/MVPA/ktl D(2009)931 **C 2009-0333**

Dear Mr Bruener,

Thank you very much for your consultation (Article 46(d) of Regulation 45/2001) related to "Transfers of personal data to third countries: 'adequacy' of signatories to Convention 108" (case 2009-0333).

The EDPS has thoroughly analysed the different scenarios described in your consultation in the light of Articles 9.1 and 9.2 of Regulation 45/2001. However, at this stage, there is not sufficient evidence as to the satisfactory implementation in practice of Convention 108 and its Additional Protocol, where relevant, in the countries of reference. Therefore, the three groups of countries mentioned could not be considered, in principle, to have an adequate level of protection in the light of Article 9.1 of the Regulation.

OLAF may want to consider carrying out an assessment in order to determine whether a transfer or a set of transfers can be done, limited to specific purposes and recipients in a country of destination. Such assessment would entail a review of the national law that implements the Convention and its Protocol and its effective implementation. The assessment is subject to the supervision of the EDPS.

Finally, the commitments undertaken by these groups of countries can not be considered as an "adequate safeguard" in the light of Article 9.7 of the Regulation, given the fact that the controller has not adduced the existence of measures that would appropriately compensate for the absence of evidence of a general level of protection.

Please find attached the analysis conducted to answer your questions. Please inform the EDPS of any decision or action you may take in this regard.

Yours sincerely,

(signed)

Peter HUSTINX

Cc: Ms Laraine Laudati, OLAF DPO

**Transfers of personal data to third countries: 'adequacy' of signatories to Council of Europe Convention 108 (case 2009-0333)**

## Preliminary note

The EDPS has conducted an assessment limited to the terms of the consultation. This does not prevent further analysis of the legal rules that have to be taken into account in the context of international transfers conducted by OLAF. For instance, among other aspects, attention has to be paid to the role of the exceptions (such as the one foreseen in Article 9.6(d) of Regulation 45/2001) in OLAF's field of activities and the need to ensure adequate protection even in those cases, where possible. Therefore, the present answer has to be viewed from this perspective, considering that it has to be complemented by an integral approach to the subject matter.

## A) Description of the terms of the consultation

OLAF (European Anti-Fraud Office) has raised the question whether three groups of identified countries can be considered to have an adequate level of protection, in the light of their relation to Council of Europe Convention 108[1] and its Additional Protocol[2]. The groups identified are the following:

(1) Countries that have signed and ratified both the Convention and the Protocol, including Albania, Andorra, Bosnia and Herzegovina, Croatia and Serbia;

(2) Countries that have signed and ratified the Convention but not the Protocol, including Georgia, Moldova and Montenegro;

(3) Countries that have not ratified either the Convention or the Protocol, but have nonetheless undertaken to apply their provisions in the context of Mutual Administrative Assistance (MAA) in customs matters provided for in agreements concluded with the Community, only for data transfers in the context of MAA in customs matters. This group includes Turkey (which is a member of the Council of Europe and has signed both the Convention and the Protocol but has not yet ratified either) and Israel (which is not a member of the Council but has observer status).

OLAF has also asked, in the alternative, and in case one or more of these groups could not be considered to have an adequate level of protection within the meaning of Article 9, paragraph 1 of Regulation 45/2001, whether the commitments they have undertaken in the context of the Convention and/or MAAs could be considered as adequate safeguards, within the meaning of Article 9, paragraph 7 of Regulation 45/2001 (hereinafter "the Regulation").

In what follows, these two aspects will be analysed, focussing first on Article 9.1 and then on Article 9.7 of the Regulation.

[1] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28.I.1981.

[2] Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows, Strasbourg, 8.XI.2001.

## B) Article 9.1 of the Regulation

Section 2 of Chapter II of the Regulation establishes the criteria for making data processing legitimate. Article 9 contains additional criteria in case of transfer of personal data to recipients, other than Community institutions and bodies, which are not subject to Directive 95/46/EC[3]. Article 9 is to a large extent based on Articles 25 and 26 of Directive 95/46/EC. These provisions of the Directive have to be taken into account, where appropriate, in the interpretation of Article 9 of the Regulation.

Article 9.1 of the Regulation stipulates that *"[p]ersonal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out"*.

Article 9.2 states that the assessment of the level of protection afforded by a third country or international organisation shall be done in the light of *"all circumstances surrounding a data transfer operation or set of data transfer operations"*. Furthermore, it provides some examples of aspects to be taken into account in the assessment: *"(...) particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the recipient third country or recipient international organisation, the rules of law, both general and sectoral, in force in the third country or international organisation in question and the professional rules and security measures which are complied with in that third country or international organisation"*. This list is not exhaustive: other elements could also be relevant, depending on the concrete case.

As further described below, the assessment of the level of protection at a certain destination may be carried out, at different levels and with different legal effects, by the European Commission, by data protection authorities and by data controllers. A determination of adequacy by the European Commission on the basis of Article 25.6 of Directive 95/46/EC is binding on the Member States. This also applies to Community institutions and bodies under Article 9.5 of the Regulation. The assessment of adequacy, in the absence of such a decision, is in many Member States entrusted to data protection authorities; in other Member States to data controllers, under the supervision of data protection authorities. Article 9 of the Regulation clearly follows this latter model.

### B.1) Analysis done by the Article 29 Working Party in WP12

In 1998, the Article 29 Working Party has developed a Working Document (WP12) on "Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive"[4]. Its Chapter 1 seeks to explain what is meant by 'adequate' and outlines a framework for how the adequacy of protection should be assessed in a particular case. It identifies a basic list of minimum conditions that have to be present in the system under analysis ("content principles" and "procedural/ enforcement mechanisms"). Chapter 2 deals with transfers to countries that have ratified the Council of Europe Convention 108. The

[3] Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.

[4] Working Document: Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive, adopted 24 July 1998 (WP)

European Commission has followed the methodology described in WP12 in its decisions on the adequacy of the protection of personal data in third countries.[5]

Since Article 9 of Regulation 45/2001 is, to a large extent, analogue to Articles 25 and 26 of Directive 95/46/EC, the analysis made in WP12 is to be taken into account when assessing international transfers conducted in the frame of the Regulation.

In Chapter 1, it is said that *"(...) data protection rules only contribute to the protection of individuals if they are followed in practice. It is therefore necessary to consider not only the content of rules applicable to personal data transferred to a third country, but also the system in place to ensure the effectiveness of such rules"*. This approach is followed in the whole document, and it briefly shows that an adequacy finding has to take into account both the law and the effective means of protection to the data subject provided in the reality. This is also the standing practice followed by the European Commission in the Adequacy analysis above mentioned.

In Chapter 2, some shortcomings of Convention 108, in the light of what has to be understood by "adequacy", are pointed out as follows: *"As regards the content of the basic principles, the Convention could be said to include the first five of the six 'minimum conditions'. (...)"*; *"A missing element of the Convention in terms of the content of its substantive rules is the absence of restrictions on transfers to countries not party to it. (...)"*; *"(...) the Convention does not oblige contracting parties to establish institutional mechanisms allowing the independent investigation of complaints, (...). This is a weakness in that without such institutional mechanisms appropriate support and help to individual data subjects in the exercise of their rights may not be guaranteed"*.

The absence of these elements would make it very easy to circumvent the data protection rules established by Directive 95/46/EC (or Regulation 45/2001, in the context of the present consultation).

Chapter 2 concluded: *"This brief analysis seems to indicate that most transfers of personal data to countries that have ratified Convention 108 could be presumed to be allowable under Article 25(1) of the Directive provided that: the country in question also has appropriate mechanisms to ensure compliance, help individuals and provide redress (such as an independent supervisory authority with appropriate powers); and the country in question is the final destination of the transfer and not an intermediary country through which the data are transiting, except where onward transfer is back into the EU or to another destination offering adequate protection"*.

Therefore, the ratification of Convention 108, complemented with the existence of the mentioned guarantees in practice, would create a presumption of Adequacy for most transfers of personal data.

**B.2) Adoption of the Additional Protocol to Convention 108: Does it change WP12 analysis?**

[5] Explicitly: e.g. Adequacy Decision on Switzerland, adopted on 26.07.2000, see Recital (3), footnote 2; Adequacy decision on the Safe Harbour Principles (US), adopted on 26.07.2000, see Recital (3), footnote 3; Adequacy Decision on PIPEDA (Canada), adopted on 20.12.2001, see Recital (3), footnote 2; and Adequacy Decision on Argentina, adopted on 30.06.2003, see Recital (3), footnote 2, available at: http://ec.europa.eu/justice_home/fsj/privacy/thridcountries/index_en.htm

In 2001, an Additional Protocol to Convention 108 was adopted. It deals with two relevant issues: (a) Supervisory authorities; and (b) transborder flows of personal data to a recipient which is not subject to the jurisdiction of a Party to the Convention. Generally speaking, this could cover the two main missing elements pointed out by Chapter 2 of WP12.

**B.3) Is the ratification of the Convention and the Protocol as such to be considered as "providing an adequate level of protection"?**

The ratification of the Convention and the Protocol could be considered as creating a presumption of adequate protection for most transfers. However, it has to be borne in mind that the adequacy method implies that not only the "law in books" has to be taken into account, but also the "law in practice" (objective and functional approach). Hence, the ratification of both the Convention and the Protocol can not *by itself* be seen as sufficient evidence of the implementation of their rules in practice.

This means that some verification of the effective implementation and application of these rules in practice has to be conducted, before it is possible to determine whether an adequate level of protection is effectively ensured for the data transfer operation or set of data transfer operations in question. This activity could be conducted by the European Commission, in the context of an adequacy finding on the basis of Article 26.6 of Directive 95/46/EC, and in other cases by a data protection authority or the data controller.

Therefore, in the light of Article 9.2 of the Regulation, the controller could assess all the circumstances surrounding a data transfer or set of data transfer operations. The analysis has to be conducted *in concreto*, taking into account the specific characteristics (guarantees and/or risks) of the transfer or set of transfers in question. This assessment would come to a conclusion as to the existing level of protection regarding a specific transfer or set of transfers, and would be limited to the purposes taken into account by the data controller and the recipients in the country of destination. In that case, the controller would assume the responsibility of verifying whether the conditions for adequacy are present. When the analysis is done by the data controller, the conclusion would be subject to the supervision of the EDPS.

In light of this, OLAF may want to consider carrying out an assessment in order to verify whether a country of destination, for a certain transfer or a set of transfers, limited to specific purposes and recipients in that country, effectively provides an adequate level of protection. Such an assessment would entail a review of the national law that implements Convention 108 and its Protocol and its effective application.

At this stage, the EDPS does not have any information with regard to the effective implementation and application of the Convention and its Protocol in the countries mentioned in the consultation, under categories 1 and 2. However, Andorra is presently subject of an adequacy procedure before the European Commission, in the context of which the Article 29 Working Party has been consulted.

**B.4) Commitments undertaken in the MAAs**

MAAs have the purpose of ensuring that customs legislation adopted by the parties of the Agreement[6] is correctly applied, in particular by the prevention, detection and investigation of operations in breach of that legislation.

The agreements with Turkey[7] and Israel[8] contain the same clause "Obligation to observe confidentiality", which reads as follows: *"Article 10. (...)1. Any information communicated in whatsoever form pursuant to this Protocol shall be of a confidential nature. It shall be covered by the obligation of official secrecy and shall enjoy the protection extended to like information under the relevant laws of the Party which received it and the corresponding provisions applying to the Community authorities.*
*2. Personal data may only be transmitted if the level of personal protection afforded by the legislations of the Parties is equivalent. The Parties shall ensure at least a level of protection based on the principles of Council of Europe Convention No 108 of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data".*

The EDPS would like to note that even if this clause requires an "equivalent" level of protection (*i.e.* equivalent to the harmonised level of protection in the EU), the level required by Directive 95/46/EC and the Regulation is an "adequate" one (*i.e.* certain essential principles have to be respected, but harmonisation or adoption of the same kind of legal instrument is not required), and this in the light of Community's present international commitments (obligation to avoid disguised barriers to trade).[9]

It has to be welcomed that the Agreements foresee that the Parties will ensure at least the level of protection of Convention 108. Nevertheless, this can only be considered as a starting point from an "adequacy" perspective. First of all, both Agreements have been signed before the adoption of the Additional Protocol (the Agreement with Turkey has been signed in 1995, and the Agreement with Israel in 2000). Secondly, there is no sufficient evidence of its implementation in practice.

However, Israel is presently also subject of an adequacy procedure before the European Commission, in the context of which the Article 29 Working Party has been consulted.

**C) Article 9.7 of the Regulation**

Article 9.7 of the Regulation stipulates that *"[w]ithout prejudice to paragraph 6, the European Data Protection Supervisor may authorise a transfer or a set of transfers of personal data to a third country or international organisation which does not ensure an adequate level of protection within the meaning of paragraphs 1 and 2, where the controller adduces adequate safeguards with respect to the protection of privacy and fundamental rights*

[6] Provisions adopted by the European Community and a third country (e.g. Turkey/Israel) governing the import, export, transit of goods and their placing under any customs procedure, including measures of prohibition, restriction and control.

[7] Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union. ANNEX 7 on mutual assistance between administrative authorities in customs matters, OJ L 35/1, 13.02.1996

[8] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part. PROTOCOL 5 on mutual assistance between administrative authorities in customs matters, OJ L 147/3, 21.6.2000.

[9] See Recital (4) of the Adequacy decisions adopted by the European Commission (Argentina, Canada, Switzerland, Safe Harbour, Guernsey, Isle of Man and Jersey), available at: http://ec.europa.eu/justice_home/fsj/privacy/thridcountries/index_en.htm. See also Article XIV GATS.

*and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses".*

The application of this rule would result only in the authorisation by the EDPS of the stream for a specific case ("transfer" or "set of transfers") on the basis of what has been adduced by the data controller. Thus, the controller has to present sufficient evidence supporting the allegations of the adoption of adequate safeguards in the specific case, even if the country of destination is not adequate as such. The "adequate safeguards" are then created *ad hoc*.

This solution is also relevant in cases where there is uncertainty as to the level of protection, regardless of whether a substantial analysis along the lines mentioned in part B has been made.

**C.1) Analysis by the Article 29 Working Party in WP12**

WP12 analyses, in Chapter 4, Article 26.2 of Directive 95/46/EC, which is analogue to Article 9.7 of the Regulation. While speaking about "a contractual provision", it says: *"(...) it must satisfactorily compensate for the absence of a general level of adequate protection, by including the essential elements of protection which are missing in any given particular situation"*. Even if the analysis is focussed on "contractual clauses", it could be taken into account in the assessment of other alleged "safeguards" or measures (such as an enforceable unilateral declaration of will).

**C.2) Can the commitments undertaken by the countries in question be considered as "adequate safeguards"?**

It has to be noted then, that the relation of the groups of countries mentioned, to Convention 108 and its Additional Protocol, where relevant, can not, in itself, be considered as an "adequate safeguard". Depending on the different cases mentioned by OLAF (groups of countries (1), (2) and (3), and the specificities of each country/schema themselves) different safeguards or measures would be necessary. The kind of safeguards depends on the extent to which it is necessary to compensate for the absence of evidence of a general level of protection.

In the present case, it can not be concluded that the controller has adduced sufficient safeguards in the specific fields where the transfers from OLAF would take place.

**D) Conclusion**

Taking into account the analysis made in the points above, the EDPS does not have sufficient evidence as to the satisfactory implementation in practice of Convention 108 and its Additional Protocol, where relevant, in the countries of reference. Therefore, the three groups of countries mentioned could not be considered, in principle, to have an adequate level of protection in the light of Article 9.1 of the Regulation.

Nevertheless, OLAF could consider carrying out an assessment in order to confirm whether a transfer or a set of transfers can be made, limited to specific purposes and recipients in the country of destination, in case they effectively provide an adequate level of protection. Such an assessment would entail a review of the national law that implements the Convention and its Protocol and their effective implementation. A drawback of this solution is that it can be challenged; therefore, unless it is carried out very seriously, it does not provide full legal certainty as adequacy decisions carried out by the Commission.

In the light of the above, a third course of action, which may offer more certainty, as well as enhance the protection of privacy and personal data, is the possibility for OLAF and recipients to adduce adequate safeguards. In this regard, the commitments undertaken so far by these groups of countries can not be considered *as such* to be an "adequate safeguard" in the light of Article 9.7 of the Regulation, given the fact that the controller has not adduced the existence of measures that would appropriately compensate for the absence of evidence of a general level of protection.

Brussels, 29 June 2009.