Conference of European Data Protection Authorities / Krakow
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Transfer of personal data to third countries – Binding Corporate Rules – The new legal instruments – applicable law

At its 50 session held 10 days ago, Art. 29 Data Protection Working Party agreed on the possibility to approve Binding Corporate Rules for data transfer inside worldwide corporations according to Europe-wide cooperation procedure and to evaluate the contents of the Binding Corporate Rules based on common scale. The document on „Cooperation Procedure for Issuing Common Opinions on Adequate Safeguards resulting from Binding Corporate Rules“ and „Model Checklist Application for Approval of Binding Corporate Rules“ are milestones for data protection in international corporations. They give sufficient reasons for recalling the way there, highlighting crucial contents and presenting the prospects of applying Binding Corporate Rules.

1. The idea of Binding Corporate Rules and its implementation in Germany

The idea of Binding Corporate Rules for data transfer inside worldwide corporations was developed by the economic sector in the late ‘90s. There was a general opinion that worldwide companies are not especially willing to conclude contracts for all data transfers, as provided for in Art. 26 paragraph 2 of the European Data Protection Directive. It was recommended to develop internal rules in this respect, which would ensure sufficient safeguards in case of data transfer from EU to group divisions in third countries which do not guarantee appropriate data protection level. At first, it was discussed whether European Data Protection Directive allows for this solutions. The idea of perceiving corporate rules as the application of the rules of conduct within the meaning of Art. 27 was quickly rejected. The
reason for this was the fact that this provision was developed only for cases where various companies are associated in trade unions and other unions. It also quickly turned out that Art. 26 paragraph 2 of the European Data Protection Directive may be used as a legal basis for corporate rules designed for the whole corporation, because the data protection safeguards required therein may in particular (but not exclusively) result from contractual clauses. At the same time, it was clear that corporate rules must fulfil the requirements in terms of their contents as in case of contractual clauses. From the point of view of some supervisory authorities, the idea of corporate rules was tempting from the very beginning, as data protection is spread around the world in this way, even in the countries where hardly any or no data protection exists.

The German legislator is one of few, if not the only one in Europe, who during (admittedly pretty late) implementation of the European Data Protection Directive in 2001 explicitly included in the act the corporate rules as further example of sufficient data protection safeguards for data transfer to third countries. Therefore, it is also not surprising that signal was given in Germany to create draft corporate rules open to discussion. Since the amendment of the Federal Data Protection Act in 2001 six Binding Corporate Rules have been approved altogether by German supervisory authorities as providing sufficient data protection safeguards.

1. In July 2002 two corporate rules of DaimlerChrysler AG were approved, one for customers and suppliers data and the other for co-workers data. Soon afterwards our supervisory authority in Berlin granted two permissions for data transfers from subsidiaries of DaimlerChrysler AG in Berlin.

2. In November 2002 corporate rules of the German Insurance Association (Gesamtverband der Deutschen Versicherungswirtschaft) were recognised as providing sufficient data protection safeguards. These rules are a model for insurance sector which shall be followed by insurance companies in Germany in case of data transfer to third countries.

3. In July 2003 German supervisory authorities approved corporate rules of General Electric Company. The group has over 100 subsidiaries in Germany from which data are transferred to third countries. The rules apply to employees’ data in the entire corporation, and special provisions on data transfer from subsidiaries in the EU to
group divisions in third countries are included in a supplement thereto. Over 20 permissions for data transfers by subsidiaries to third countries were granted based on the corporate rules.

4. In **November 2003** corporate rules of Deutsche Telekom were approved, which apply to the transfer of customers and co-workers data.

5. German supervisory authorities will soon approve corporate rules of Schering AG, one of the biggest pharmaceutical companies with the seat in Berlin and subsidiaries all around Europe. These rules will apply to customers and co-workers data, as well as to clinical research. Initially, the company applied for Europe-wide cooperation procedure in our supervisory authority in Berlin. However, this one is not necessary, as it turned out after a thorough analysis that data transfer from group divisions in the EU may be conducted on the basis of these rules only from the head office of the group in Berlin.

2. **The idea of cooperation procedure and its development in Europe**

The idea of cooperation procedure for approval of Binding Corporate Rules by supervisory authorities was for the first time discussed by supervisory authorities of Austria, the Netherlands and Germany in **summer 2002**. They have already received specific enquiries from the economic sector. In connection with this, the first meeting was held in the office of the Austrian data protection authority in September 2002, during which the criteria of lead management by the supervisory authority in Europe were discussed. The criteria developed there were in this or another way included in the Working Document WP 74 of Art. 29 Data Protection Working Party, as well as in the newest document on cooperation procedure.

From the German point of view, the idea of **European** cooperation procedure was clear. In particular it was obvious that in Germany procedures tested by supervisory authorities shall be also used for European cooperation. There was hope already at that time that solutions which are successful in German cooperation procedure with 16 supervisory authorities may also be successful in case of European supervisory authorities, even if the agreement process is made difficult by language barriers.
The Europe-wide cooperation procedure that was adopted by the Art. 29 Data Protection Working Party in its recent document is based on cooperation procedure applied by German supervisory authorities. Participation in this procedure is of course voluntary. Nevertheless, the participation is advisable, as it is necessary to avoid a situation where companies address various supervisory authorities in Europe and obtain various decisions on their corporate rules. This would be unsatisfactory, not just from the company’s perspective. All other matters shall be also adapted to the idea of internal market.

As regards Europe-wide cooperation, it will be at first decided in a particular case which supervisory authority shall take over responsibility for negotiations with companies. It will not necessarily be the supervisory authority first contacted by the company. Moreover, criteria will have to be found which justify competence of a specific supervisory authority. These criteria will be selected so as to create legal certainty in case of supervisory authorities and participating companies, and to avoid „Forum Shopping” at the same time. Company willing to apply for approval of corporate rules in a few Member States of the European Union shall not be allowed to address at first the supervisory authority being most favourable for the company and then to present a positive decision of this authority to other supervisory authorities in Europe. Many inquiries addressed to our authority in Berlin by worldwide companies with subsidiaries in Germany showed that Germany is chosen first as a country which facilitates Europe-wide approval of corporate rules. The indicated reason (which can undoubtedly be refuted) is that German supervisory authorities have the strictest requirements for corporate rules and hence their approval of the rules will almost certainly entail their approval by other supervisory authorities in Europe.

The cases of DaimlerChrysler, General Electric and Philips gave also a reason for organising two further meetings on „Europe-wide cooperation” held in the first half of 2004 in Haag and in Berlin. During these meetings not only both currently adopted working documents were discussed and further developed, but also decision was issued on lead authority in Europe-wide cooperation procedure in the above mentioned cases: the competent authority for corporate rules for data of DaimlerChrysler customers is CNIL, for corporate rules of General Electric – the British supervisory authority, and for corporate rules of Philips – the Dutch supervisory authority. In the cases of DaimlerChrysler and General Electric Germany cannot participate in European cooperation procedure, because – as it has been already said –
corporate rules have been approved here for years and permissions have been granted on their basis.

3. New Working Documents of the Art. 29 Data Protection Working Party / Prospects

The Art. 29 Data Protection Working Party adopted Working Document WP 74 with substantial consideration on Binding Corporate Rules on June 2003 and took up these issues again at the end of 2004. The currently adopted working documents were discussed at meetings in Brussels and The Hague. They were a basis of an official hearing in which representatives of economic sector took part. The requirements with regard to contents of corporate rules were included in the Checklist for companies on initiative of the British supervisory authority. Next in particular questions related to binding force of corporate rules outside and inside (so, both in the corporation and outside for the benefit of the interested data subjects) shall be answered. Moreover, for the rules to be approved the data processing, as well as particular data protection safeguards and mechanisms of handling data subjects complaints must be presented. When checking corporate rules in cooperation procedure it is quite important to note that the rules must foresee only sufficient data protection safeguards within the meaning of the European Data Protection Directive. Additional requirements resulting from specific national law of EU Member State should not and cannot be part of a discussion of supervisory authorities in cooperation procedure. Specific requirements under national law (as e.g. registration and authorisation obligations) shall be also included in the “Model Checklist with national requirements” prepared by particular supervisory authorities. This additional document could be provided to companies together with currently adopted “Model Checklist”. Owing to this companies could in advance prepare for national requirements after approval of corporate rules in cooperation procedure.

The new documents of the Art. 29 Data Protection Working Party are already used in the mentioned cases by relevant supervisory authorities and further developed depending on experience gained in these cases. The involved supervisory authorities hope for the best and are determined to successfully complete the cooperation procedure (concerning DaimlerChrysler, Philips and General Electric) which has been performed so far. On Friday afternoon the British supervisory authority as the first lead authority sent – in accordance with the document on cooperation - consolidated draft corporate rules of GE together with required
background information to the concerned supervisory authorities in Europe, which are invited to participate in European cooperation procedure. They include (next to United Kingdom) Denmark, Finland, France, Ireland, the Netherlands, Austria and Sweden. General Electric would like to obtain approval of corporate rules by supervisory authorities from these countries at first.

We can just hope that after successful completion of cases more and more supervisory authorities in Europe will be persuaded of reasonableness of cooperation procedure, instead of – as it is said in Germany – „inventing the wheel anew”.

Anyway, we have to wait and see whether the main idea of cooperation procedure, as specified in the Working Document WP 74 of the Art. 29 Data Protection Working Party, is realistic or whether it remains a wish. According to it, companies shall allowed to submit only one application for authorisation by the supervisory authority in the EU, which leads to granting permissions by all data protection authorities of the Member States. There is no legal basis for this, either in national codes of conduct or in the European Data Protection Directive. Experience at national level may lead to the conviction that amendment of the European Data Protection Directive is necessary for mutual approval of corporate rules by supervisory authorities in Europe. After successful testing of both document efforts could be made again in the European Commission to develop standard corporate rules on the model of standard contractual clauses, even if current wording of Art. 26 paragraph 4 of the European Data Protection Directive does not allow this. Irrespective of this, it is questionable whether there is still economic demand for this, as it turned out in the meantime that individual shape of corporate rules is often perceived as part of „Corporate Identity”.

Meanwhile, the economic sector further develops the original idea into corporate rules: is it possible that after the approval of some corporate rules of various companies simplified data transfer between these companies is achieved? Realisation of this thesis is still “a dream of the future”, as it assumes at least that there is a network of corporate rules adapted to each other. Successful completion of current cases, i.e. approval of the rules by the involved European supervisory authorities may, however, constitute the first step in this direction.