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**THE DATA PROTECTION AGENCY**

**22726 INSTRUCTION 1/2000 of 1 December 2000 issued by the Data Protection Agency on the rules governing international data movements**

Since the approval of derogated Organic Law 5/1992 of 29 October 1992 regulating the automatic processing of personal data (LORTAD), the system for international movements of personal data has given rise to one of the greatest numbers of doubts among data controllers and in society in general.

These doubts probably arise from the fact that the rules governing this subject contained in the Law and its implementing regulations have had to be adapted to those included in Articles 25 and 26 of Directive 95/46/EC of the European Parliament and of the Council 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 and the decisions adopted by the European Commission to comply with those.

The Data Protection Agency's actions in the nearly seven years it has existed have given rise to much casuistry in relation to international transfers of personal data which has not hitherto been systematically set down in any text.

Furthermore, Article 37c) of Organic Law No. 15/1999 of 13 December 1999 on the protection of personal data rules vests in the Data Protection Agency the power to "issue as appropriate and without prejudice to the powers of other bodies the precise instructions to adapt processing to the principles of this law".

In exercising this power, this instruction aims to indicate the guide criteria followed by the Data Protection Agency in relation to processing which entails an international data transfer by highlighting the procedure which the agency follows in each specific case by virtue of the power vested in it by the Law.

This instruction is not therefore intended to introduce any innovation whatsoever in the rules governing the protection of personal data. It aims simply to clarify and in a single text to set out for all concerned the procedure the agency follows in complying with the various rules referring to the international movement of data.

II

Articles 33 and 34 of Organic Law No. 15/1999 lay down the regime to be observed by international movements of data. Without amending the general criterion governing transfers, i.e. the requirement of authorisation by the Director of the Data Protection Agency, these adapt the system of exceptions to this authorisation by adding to those already contemplated in LORTAD others arising from the provisions of Articles 25 and 26 of Directive 95/46/EC. In particular, Article 34k) of Organic Law No. 15/1999 excepts from the general rule of authorisation the event that "the transfer is to a destination in a European Union Member State or a State which the European

Commission in the exercise of its powers has declared guarantees an adequate level of protection".

Accordingly, account must be taken of the recent European Commission Decisions No.s 2000/518/EC, 2000/519/EC and 2000/520/EC of 26 July (published in the Official Journal of the European Communities on 25 August 2000) which considered adequate the level of protection of personal data in Switzerland, Hungary and that "provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce".

The regime regulating the international movement of data is in any case governed by the general principle contained in Article 25.1 of the Directive that transfers to enterprises or administrations located in the territory of third country must be understood to be "without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive". The same statement is contained in Article 2 of each of the aforementioned Commission decisions.

### III

In the light of the above, this instruction is divided into two sections:

The first lays down criteria extending to all international data transfers, indicating the general concepts to be borne in mind for complying with the law. This section also recalls the general principle referring to necessary compliance with Organic Law No. 15/1999 by those persons and agencies aiming to carry out an international data transfer. Lastly, it indicates the procedure provided by the law in force for notifying such a transfer to this Data Protection Agency.

Section Two refers to specific transfer hypotheses. In particular, three specific events are contemplated, two of which concern the country of destination of the data while one depends on the final purpose of the transfer.

Rule Four thus refers to those non-Community countries found to provide an adequate level of protection, with particular reference to the event contemplated by Commission Decision 2000/520/EC as referred to above.

Rule Five considers the contractual solution for transfers requiring the authorisation of the Director of the Data Protection Agency, in accordance with Article 33 of Organic Law No. 15/1999, and specifies those details which the Agency has considered necessary for an understanding that the transfer offers sufficient guarantees. In its report of 11 June 2000, the European Parliament considered the contractual solution the most effective instrument to ensure that the data transfer offers adequate guarantees. The document produced by the Working Party on the Protection of Individuals with regard to the Processing of Personal Data set up by Article 29 of the Community Directive of 24 July 1998, referring to the criteria for interpreting the system of international transfers, also contains specific provisions referring to this contractual situation,

Lastly, Rule Six refers to those cases in which, regardless of the country of destination of the data, the transfer involves the contracting of a data processing service on behalf of the controller, and the data being transferred to the person defined by Law No. 15/1999 as the "processor". In this case, pursuant to Article 12 of the Law, without prejudice to

compliance with the other requirements referred to in this Instruction, the entity forwarding the data and the entity receiving the data must enter into a contract.

Accordingly, by virtue of the powers vested in it by Article 37c) of Organic Law No. 15/1999, this Agency has provided as follows:

## **SECTION I. GENERAL PROVISIONS**

### **Rule One. Scope**

This instruction shall apply to all international transfers of personal data.

For these purposes, any transmission of data outside Spanish territory shall be considered to be an international data transfer. In particular, any transfer by which data are ceded or communicated and any transfer for the purposes of having data processed on behalf of the controller shall be considered as such.

For the purposes of this instruction, the transmitter shall be understood as the natural or legal person, public or private, who is responsible for the file or the processing of the personal data which are transferred internationally, and the recipient shall be understood to be the natural or legal person, public or private, located beyond Spanish territory who receives the transferred data.

### **Rule Two. Compliance with Organic Law No. 15/1999**

The international transfer of data does not exclude the application of the provisions contained in Organic Law No. 15/1999 in accordance with its scope, and the Data Protection Agency shall be responsible for checking compliance with this.

In any case, pursuant to Article 5 of Organic Law No. 15/1999, any controller or processor which proposes to transfer personal data outside Spanish territory must have informed the data subjects who the recipients of the data will be, the purpose of the international transfer and how the recipient may use the data.

The duty to inform referred to in the preceding paragraph shall not apply when the transfer is for the purpose of the provision of a service to the controller on the terms laid down by Article 12 of Organic Law No. 15/1999.

### **Rule Three. Notification of transfers provided in the General Data Protection Register**

1. Pursuant to Article 26.2 of Organic Law No. 15/1999, any person or entity which intends to effect an international data transfer must expressly record this by giving notification of the file to the General Data Protection Register.

The notification of the transfer shall be drawn up on the terms contained in the standard model approved to this end by the Director of the Data Protection Agency, shall expressly state the country to which the transfer is to be made and the grounds pursuant to Article 34 of the same Organic Law No. 15/1999 for not seeking the express authorisation of the Director of the Data Protection Agency.

If the international transfer concerns data contained in a file which is already registered in the General Data Protection Register and the transfer is not recorded in the entry, the controller must apply for an amendment thereto by giving notification of the details to which the previous paragraph refer.

If the files are in public ownership, the transfer must be provided for in the regulation by which the file was created or amended.

2. On receiving the notification, the Data Protection Agency may require the controller to provide the documentation necessary to complete the information concerning the international transfer concerned and the identity of the recipient of the data within ten days.

To this end, the controller or processor may be required to provide the documentation proving compliance with the obligation referred to in Rule Two of this instruction. In particular, if the controller states that the data subject has given consent, proof of this consent may be required. Similarly, proof of a contractual relationship with the data subject which provides grounds for the transfer may be required if such a relationship is alleged.

The file controller may also be required to provide evidence of the details referred to in Section Two off this instruction.

When the information referred to in this section is requested, the file controller shall be informed that, if this is not provided within ten days, his application for registration or amendment will be considered to have been discontinued, and it will be archived.

3. If the documentation provided does not prove that the requirements of Organic Law No. 15/1999 are met, the Director of the Data Protection Agency, by virtue of the powers vested in him by that Law, shall refuse the registration or amendment.

4. The Director of the Data Protection Agency may be asked to reconsider a decision on the registration or amendment of files, or an appeal may be lodged in the Contentious Administrative Chamber of the National High Court.

## **SECTION II. PROVISIONS APPLICABLE TO SPECIFIC TRANSFERS**

### **Rule Four. Transfers to the territory of countries which provide an adequate level of protection**

1. When the international transfer is to a recipient or public or private entity located on the territory of a country which is not a member of the European Union but which has been declared to provide an adequate level of protection or which is a member of the European Economic Area, the controller may be asked to provide the documentation referred to in paragraph 2 of Rule Three of this instruction.

2. Without prejudice to the provisions of Rule Two, in the light of the transmitter's submission, the Director of the Data Protection Agency, by virtue of the power vested in him by Article 37f) of Organic Law No. 15/1999, may agree to the temporary suspension of the data transfer to a recipient located in a third country which has been declared to provide an adequate level of protection when any of the following circumstances provided for in the decisions of the European Commission obtain:

a) the data protection authorities of the recipient state, or of any other where the former do not exist, rule that the recipient has breached the data protection rules of their national law;

b) there is prima facie evidence that the recipient is in breach of the rules or principles of data protection and that the competent authorities in the country in which the recipient is located have not adopted or are not in future going to take appropriate measures to resolve the case in question even if notified of the situation by the Data Protection Agency. In this case, the transfer may be suspended when its continuation would generate an imminent risk of grave injury to the data subjects.

In these cases, the decisions of the Director of the Data Protection Agency shall be notified to the European Commission.

3. If the transfer is based on the provisions of Decision 3000/520/EC "on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce", the party applying to effect the transfer must provide evidence that the recipient is one of the entities which has subscribed to these principles and that that it is subject to the jurisdiction of one of the government bodies in the United States listed in Annex VII to the aforementioned Decision.

4. The provisions of the previous paragraph shall apply to all cases in which the European Commission declared the level of protection adequate in respect of a system of self-regulation or similar conditions to those contained in Decision 2000/5230/EC.

5. The Director of the Data Protection Agency may be asked to reconsider a decision on the registration or amendment of files, or an appeal may be lodged in the Contentious Administrative Chamber of the National High Court.

#### **Rule Five. Transfer to the territory of other countries**

1. When the international transfer is to a recipient or public or private entity located on the territory of a country which is not a member of the European Union which the European Commission has not found to provide an adequate level of protection or which is not a member of the European Economic Area and the transfer is based on any of the hypotheses provided in paragraphs a) to j) of Article 34 of Organic Law No. 15/1999, the Data Protection Agency may require the controller to provide documentation supporting his claim.

2. If the transfer is not based on any of the hypotheses referred to in the preceding paragraph or when these circumstances have not been duly proved to obtain, the authorisation of the Director of the Data Protection Agency must be sought pursuant to Article 33 of Organic Law No. 15/1999.

Without prejudice to the provisions of paragraph 7 of this Rule, this authorisation shall be granted if the controller produces a written contract between the transmitter and the recipient which provides the necessary guarantees to protect the data subjects' privacy, their fundamental rights and freedoms and the exercise of their corresponding rights.

The contract in question must provide the following, as a minimum:

- a) the identity of the transmitter and the recipient of data;
- b) the purpose of the international transfer and the data to be transferred;
- c) an undertaking by the transmitter that the collection and processing of the data on Spanish territory comply fully with the rules contained in Organic Law No. 15/1999 and that the file on which the data for transfer are recorded is entered on the General Data Protection Register;
- d) an undertaking by the recipient that it will process these exclusively for the purpose given as the reason for the transfer and in accordance with the data protection standards of Spanish law and an undertaking not to communicate the data to any third party without having obtained the consent of the data subjects;
- e) an undertaking that the recipient will adopt the security measures required by the laws on personal data protection in force in Spain;
- f) an undertaking that the transmitter and recipient shall be jointly and severally liable vis-à-vis private individuals, the Data Protection Agency and the Spanish legal authorities for any breach of the contract by the recipient which breaches Organic Law No. 15/1999 or causes injury to the data subjects;
- g) an undertaking that any data subject injured as a result of the processing by the recipient shall be compensated in accordance with the liability system referred to in the previous paragraph;
- h) a guarantee that the injured party may exercise his rights of access, correction, cancellation or opposition vis-à-vis the data transmitter and recipient of the data. It must also be stated that a data subject whose rights are infringed may ask the Data Protection Agency to intervene on the terms provided in Organic Law No. 15/1999;
- i) an undertaking from the data recipient to grant access to the establishment where these are being processed, to documentation, hardware and software to representatives of the Data Protection Agency or an independent entity appointed by the former when required for the purposes of verifying compliance with the obligations arising from the contract;
- j) an undertaking that, once the contractual relation has ended, personal data must be destroyed or returned to the transmitter along with any medium or document in which any personal data on the subject is contained;
- k) an undertaking that data subjects may require compliance with the provisions of the contract in all matters in which it is to their benefit.

3. The Data Protection Agency may ask that the contract provided incorporate any amendments necessary to guarantee compliance with the requirement contained in the preceding two paragraphs within ten days.

4. The Director of the Data Protection Agency shall refuse the transfer if a contract meeting the requirements of paragraphs 2 and 3 of this Rule is not provided by this deadline.

5. When authorising a transfer, the Director of the Data Protection Agency shall order it to be entered on the General Data Protection register and notified to the European Communities.

6. Any future contracts pursuant to European Commission decisions which comply with Article 26.4 of Directive 95/46/EC shall have the same legal effect provided that proof of complete compliance is provided.

7. Without prejudice to the provisions of the preceding paragraphs of this Rule and Rule Two, the Director of the Data Protection Agency may refuse or, by virtue of the powers vested in him by Article 37f) of the Organic Law No. 15/1999, temporarily suspend a transfer, pending submissions by the transmitter, when any of the following circumstances is found to obtain:

a) the protection of the fundamental rights and public freedoms or legislation in the country of destination prevent any guarantee of full performance of the contract and the exercise by those concerned of the rights guaranteed by the contract;

b) the recipient entity has previously breached the guarantees laid down in contractual clauses of this kind;

c) prima facie evidence exists that the recipient does not, or will not, uphold the guarantees provided by the contract;

d) prima facie evidence exists that the mechanisms for applying the contract are not, or will not be, effective;

e) the transfer, or its continuation if it has begun, may give rise to the risk of real injury to the data subjects.

Rulings by the Director of the Data Protection Agency rejecting or suspending any international data transfer for any reasons referred to in this section shall be notified to the European commission when so required.

8. The Director of the Data Protection Agency may be asked to reconsider a decision on the registration or amendment of files, or an appeal may be lodged in the Contentious Administrative Chamber of the National High Court.

#### **Rule Six. Specific features of transfers for the purposes of processing data on behalf of a controller**

1. When an international data transfer is for the purposes of having data processed on behalf of the controller, such processing must be regulated by a contract stating that the transmitter is directly liable for any breach of the law by the recipient.

The contract, which must be in writing, shall expressly provide that the recipient shall solely process the data in accordance with the transmitter's instructions, shall not apply or use them for any purpose other than that stated in that contract and shall take the security measures required of the transmitter pursuant to the data protection provisions of Spanish law.

It must also state that, once the contractual service has been provided, the personal data must be destroyed or returned to the transmitter, along with any medium or document containing any personal data for processing.

2. The recipient may not communicate the data to any other party, even for storage.

Accordingly, if the transmitter wishes to have several separate entities located outside Spanish territory provide processing services on the terms of Article 12 of Organic Law No. 15/1999, it must enter into a contract for such services with each of the entities. No recipient may subcontract this activity to another firm unless it is acting in the name of and on behalf of the controller

3. In the event of an international transfer to a recipient or public or private entity located on the territory of a country which is not a member of the European Union which the European Commission has not found to provide an adequate level of protection or which is not a member of the European Economic Area, the contract must provide similar guarantees to those indicated in Rule Five with regard to sanctions and compensation of data subjects and with regard to the powers of the Data Protection Agency in the event of the recipient's using the data for any purpose other than that providing the grounds for transfer or communicating them or using them in breach of the provisions of the contract,

Madrid, 1 December 2000,

Juan Manuel Fernandez López  
Director of the Agency