



**02294/07/EN**  
**WP 143**

**8<sup>th</sup> Directive on Statutory Audits**  
**Opinion 10/2007 by the Article 29 Working Party**

**Adopted on 23 November 2007**

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.

The secretariat is provided by Directorate C (Civil Justice, Rights and Citizenship) of the European Commission, Directorate General Justice, Freedom and Security, B-1049 Brussels, Belgium, Office No LX-46 01/43.

Website: [http://ec.europa.eu/justice\\_home/fsj/privacy/index\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm)

## **I. Introduction**

On 15 February 2007, the Article 29 Working Party examined a working document presented by DG Internal Market on transfers to third country public regulators of audit working papers containing personal data. The working paper explains the EU legal regulatory framework set up by Directive 2006/43/EC<sup>1</sup> on statutory audits of annual accounts and consolidated accounts (the 8<sup>th</sup> Directive).

The 8<sup>th</sup> Directive provides for the conditions to carry out the statutory auditing activity and sets out an independent public oversight for statutory auditors by Member States.

The 8<sup>th</sup> Directive also contains specific provisions relating to the cooperation between public oversight bodies from Member States and competent authorities of third countries. Such cooperation should include the exchange, with third country authorities, of the auditor's working papers and other documents held by European audit firms.

The Working Party is pleased to comment on the regulatory framework applying to such information exchange on the basis of the working document referred to above and of the comments received by Member States in this connection.

## **II. The legal framework for exchanges of information between EU public oversight bodies and third country authorities**

Article 47 of the 8<sup>th</sup> Directive sets out two regimes for the transmission of information and data to a third country public oversight authority: a "general regime" for the international transfers between competent authorities (Art. 47(1) to (3)) and a "special regime" ((Art. 47(4) and (5)).

Article 47(4) foresees that *in exceptional cases, and by way of derogation from the "general regime" laid down in Article 47(1)*, Member States may allow statutory auditors and audit firms to transfer audit working papers and other documents directly to the competent authorities of a non-EU jurisdiction.

Article 47 (1) states that Member States may allow the transfer of audit working papers or other documents of audit firms from a Member State public oversight body to the third country's competent authorities, provided that certain conditions are satisfied. Article 47 1(b) sets out the conditions required for such exchange of information to take place. The main conditions are:

- The audit working papers to be exchanged relate to audits of companies which have issued securities in that third country or which form part of a group issuing statutory consolidated accounts in that third country;
- The transfer takes place via competent authorities of the EEA Member State to the competent authorities of that third country
- there are working arrangements on the basis of reciprocity agreed between the competent authorities concerned: the working arrangements have to ensure that justification is

---

<sup>1</sup> OJ L 157, 9.6.2006, p. 57

provided by the competent authorities of the purpose of the request for having access to audit working papers and other documents, the working arrangements could probably take the form of memoranda of understanding between a national oversight authority and the competent authorities of the third country setting out the conditions and forms of cooperation;

- the persons employed by the authorities of the third country that receive the information are subject to obligations of professional secrecy;
- the competent authorities of the third country may use audit working papers and documents only for the exercise of their functions of public oversight, quality assurance and investigations;
- the transfer is in accordance with Chapter IV of the Data Protection Directive (international transfers of personal data); and
- the competent authorities of the third country concerned meet requirements of an adequacy test based on a 'comitology' decision. This adequacy test is different from the adequacy assessment of the level of protection afforded to personal data in that third country.

The conditions mentioned above are cumulative. If they are not met, in particular if a working arrangement has not been concluded, no co-operation by means of regular exchange of documents in the case of inspections shall be possible.

### **III. Analysis in a data protection perspective**

#### Considerations on the scenarios applying to the exchanges of information with third-country supervisory authorities

The DG MARKT paper presents two different possible scenarios for the exchange of information between an EU public oversight authority and a third country public competent authority, apart from the “exceptional cases” mentioned in Article 47(4) of the Directive:

- a short term solution limited to formal investigations in the case of corporate scandals,
- a medium term solution, which should be available in 2008/2009, within the framework of bilateral arrangements between a third country and the Member States.

As for the medium-term solution, based on the information made available by DG MARKT, the approach envisaged would consist of working to ensure that the third countries, and especially the US, will adopt the rule of recognition of the EU oversight system. Public oversight bodies would in principle rely on the work of the corresponding public oversight in the other jurisdiction (home country supervision).

#### 1. Short-term solution limited to formal investigations in the case of corporate scandals

A short term solution would be limited to formal specific investigations in the case of a corporate scandal, and in the absence of a bilateral agreement or memorandum of understanding between an EU independent oversight and a third country competent authority.

If the third country in question is not adequate under the terms of Directive 95/46, the Member State's domestic law transposing the provisions contained in Article 26(1)(d) thereof can provide a legal basis for the transfer to take place.

However, the Working Party recalls that Article 26(1)(d) is part of the derogations provided for in the Directive for the regime of international transfers of personal data; accordingly, it should be limited to exceptional cases as a solution of last resort and be interpreted restrictively<sup>2</sup>. In order to apply Article 26(1)(d) and – accordingly – the domestic provisions transposing it, the following preconditions must be both fulfilled:

- i. There must be a “*substantial*” *public interest* in communicating such personal data as are contained in working papers/documents. In this regard, the Working Party has already emphasized that the “substantial” public interest must be vested either in the Member State at issue or in the European Community. Only important and substantial public interests identified as such by the national legislation applicable to data controllers established in the EU are valid in this connection. Any other interpretation would make it easy for a foreign authority to circumvent the requirement for adequate protection in the recipient country laid down in Directive 95/46<sup>3</sup>. It is the responsibility of the national oversight authority (competent for the audit) performing the transfer to decide on whether there is a substantial public interest, using a case-by-case approach in the light of the relevant domestic legislation and taking into account, where appropriate, an opinion by the national DP authority. In particular, by having regard to market connections, the “substantial” public interest requirement could also be considered to be met if agreements are in place between the auditing authorities (i.e. between the European and the third country’s ones) on the basis of domestic legislation.
- ii. Additionally, only such personal data as are necessary to achieve the substantial public interest purpose specified above may be transferred. Again, this assessment is left to the authority ordering the working papers/documents to be transferred, by having regard to the requests made by the third country authority. This would mean that the personal data to be transferred should be limited to those strictly necessary and relevant for the purposes of the ad hoc investigation. In this regard, for instance, personal data relating to staff/employees may not be transferred in their entirety. Special care should be taken with regard to sensitive and judicial data. As a consequence, the personal data being transferred may not be used by the third country

---

<sup>2</sup> This stance was consistently taken by the WP in respect of all the cases mentioned under Article 26(1) of the Directive. See, in this connection, WP 29, Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive, 24 July 1998, WP 12, p. 24: “*These exemptions, which are tightly drawn, for the most part concern cases where risks to the data subject are relatively small or where other interests (public interests or those of the data subject himself) override the data subject’s right to privacy. As exemptions from a general principle, they must be interpreted restrictively*”. That view was re-affirmed subsequently in the Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995 (WP 114); under point 1.2, it was reiterated that “*the interpretation of Article 26(1) must necessarily be strict.*”

<sup>3</sup> See working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995. Doc WP 114, point 2.4 according to which “*the drafters of the Directive clearly did envisage that only important public interests identified as such by the national legislation applicable to data controllers established in the EU are valid in this connection. Any other interpretation would make it easy for a foreign authority to circumvent the requirement for adequate protection in the recipient country laid down in Directive 95/46*”; Opinion 6/2002 on transmission of passenger manifest information and other data from airlines to the United States, Doc WP 66, point 2.5. See also, regarding construction of the provision on existence of a “legal obligation” as per Article 7(c) of the Directive, Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime, Doc. WP 117, point IV 1(i).

recipient authority for different purposes, nor may they be communicated further for such different purposes.

Where the competent authority (for statutory audits) does not hold the view that the substantial public interest requirement arising out of Article 26(1)(d) of the Directive is fulfilled in the light of domestic law, it might nevertheless be possible to proceed with the transfer in accordance with Article 26(2). The competent authorities (for statutory audits) might avail themselves of the adequate safeguards afforded by standard contractual clauses stipulated with regard to this type of data transfer – which would require no case-by-case analysis of the data transfers at issue. Although standard contractual clauses are mostly used for data transfers in the business sector, they would appear to be sufficiently flexible to enable application also in this area.

There is little doubt that using standard contractual clauses does not rule out the need for the national competent authority to check – in the light of domestic legislation – whether the preconditions to allow the disclosure of data to the third party competent authority are fulfilled. As repeatedly pointed out by the Article 29 Working Party, the adoption of standard contractual clauses should in no case become the means for dodging domestic provisions that regulate the communication of the data processed by the competent authority.<sup>4</sup>

## 2. Medium-term arrangements for regulator inspections

The medium term arrangements for the exchange of inspection reports within the framework of bilateral agreements concluded between a Member State and a non-adequate third country would provide for the communication of personal data of auditors (and mainly their names and the names of professionals who play a significant role in the audit firm's management and quality control), and only for the purposes of public oversight, quality assurance and investigations functions by the country authorities.

Article 47 (1) of the Directive lays down the conditions that such working arrangements shall meet; in particular, the transfer of personal data must be in accordance with provisions on international transfers of Directive 95/46/EC<sup>5</sup>.

Under the above conditions, there would not appear to be specific obstacles in the light of Article 26(1)(d) of the Directive – to the extent the transfer of the data at issue is found to be necessary.

---

<sup>4</sup> This was stated clearly in Opinion 1/2001 on the Draft Commission Decision on Standard Contractual Clauses for the transfer of Personal Data to third countries under Article 26(4) of Directive 95/46, 26 January 2001, Doc. WP 38, point 2; with regard to transborder data flows, the Working Party held the following view: “*The lawfulness of such processing operation remains entirely subject to the conditions of the national legislation implementing the provisions of the Directive 95/46/EC. Should a transfer by means of the standard contractual clauses approved by the Commission not fulfil the conditions set up in the national law as regards these aspects, the intended transfer to third countries could not take place. In particular, if a disclosure of data to a third party recipient inside a Member State of the controller would not be lawful, the mere circumstance that the recipient may be situated in a third country does not change this legal evaluation*”.

<sup>5</sup> See also Directive 2006/43/EC, recital 29.

However, the Article 29 Working Party would like to stress that a more precise reply on this point requires more specific information about the conditions of the agreement that would be concluded with the third country and the conditions of the adequacy test.

Possible guidelines for such adequacy test are appended to this opinion in order to ensure appropriate safeguards from the perspective of the protection of personal data .

#### **IV. Conclusion**

The Article 29 Working Party holds the view that Article 26(1)(d) of Directive 95/46/EC can provide a legal basis for the transfer to third country public regulators of audit working papers containing personal data – under the “*standard regime*” envisaged by Directive 2006/43 (Article 47(1) to (3)).

However, the Article 29 Working Party recalls that Article 26(1)(d) derogates from the general regime of the data protection Directive applying to cross-border data flows; as such, it should be interpreted restrictively by having regard to the substantial public interest served by the transfer (as vested either in the individual Member State or in the EU) and by ensuring that only relevant and necessary personal data are transferred for the sake of such substantial public interest. Among the conditions to be fulfilled in view of the transfer, passing the adequacy test mentioned in Article 47(3) of Directive 2006/43 plays a key role.

The Article 29 Working Party reserves the right to provide more specific views in this regard as soon as more detailed information on the specifics of such test becomes available, and reiterates its willingness to co-operate with all the relevant stakeholders in order to ensure that the adequacy test takes due account of data protection principles.

As regards the “*special regime*” envisaged in Article 47(4) of Directive 2006/43, as a regime that would be used in exceptional cases and by way of derogation from the “general regime”, whereby the papers and documents are transferred directly by auditors and audit firms to the third country competent authorities, the Article 29 Working Party calls on the Commission to seek its contribution in connection with the activity the Commission is empowered to carry out under Article 47(5) of this Directive, in view of specifying the “*exceptional cases*” of transfer, so as to ensure a more uniform application of those provisions.

Done at Brussels, on 23<sup>rd</sup> November 2007

*For the Working Party*  
*The Chairman*  
*Peter SCHAAR*

## Annex

Possible Guidelines to be complied with in order to ensure data protection adequacy in working arrangements to be concluded following the procedure laid down in Article 47(1)c of Directive 2006/43/EC.

(a) A non-exhaustive list of documents that can be transferred could be drawn up in 'comitology' measures. The list could cover, for instance: audit working papers; papers related to review of a group auditor under Article 27, other documents coming from auditors (engagement letter, correspondence with regulator,...), inspection reports/outcome issued by audit regulators or other regulators.

(b) Documents that are not considered, by the competent public oversight authority of a Member State, necessary to an investigation or inspection may not be transferred. Transfers of documents should not be systematic and should be done only in duly justified cases upon individual request.

(c) The non-EU jurisdiction authorities should not be allowed to make transmitted documents public – directly or indirectly. In addition, it should, in principle, not be possible to use such documents for different purposes or by different authorities, such as tax authorities or courts.

(d) Specific conditions should be laid down as regards the maximum retention period of the documents transferred, to ensure that documents are not kept longer than necessary to fulfil the task for which the documents were requested (in any event, for no longer than the time limit provided for in national law for the performance of supervisory tasks).