



REPUBLIK ÖSTERREICH
DATENSCHUTZKOMMISSION

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DVR: 0000027

GZ: DSK-K209.750/0645-DSK/2013

Sachbearbeiter: Mag. Michael SUDA

Rechtsauskunft durch die Datenschutzkommission
Ersuchen um verbindliche Darstellung der Rechtslage betreffend
einen möglichen Konflikt zwischen DSG 2000 und US-Bundesrecht
zum Gebrauch vor US-Bundesbehörden
(Anfrager: ISDA, Roger Cogan)
Antwortschreiben (in englischer Sprache)

Mr
Roger Cogan
ISDA - International Swaps and Derivatives Association, Inc. (Brussels)

Square de Meeus 38/40, 4th floor
B-1000 Bruxelles/Brussel
Belgien/Belgium

per E-Mail: RCogan@isda.org; BGourisse@isda.org

Re: **your request for advice/information of July 24th 2013**

Dear Mr. Cogan,

1. The applicability of Austrian data protection law depends on whether the reporting party (data controller) has at least an operative branch office in Austria and the relevant data is being processed for purposes of this entity (*"for purposes of a main establishment or branch establishment in Austria of the controller"*, Sect 4 (1) of the Austrian Data Protection Act 2000 (DSG 2000)). It is non-essential where or by whom the data is actually being processed (e.g. seat of the data processor, location of data processing equipment).
2. Using the terms of the EU-Data Protection Directive 95/46/EC (Directive 95/46/EC) we consider the CTFC as a data controller. A transfer of personal data from a data controller under Austrian jurisdiction to a SDR, the latter acting on behalf and under control of the CTFC, would, from the legal point of view, be an immediate transmission (*"Uebermittlung"* in German) to the CTFC.


3. The statutory law applicable on the transfer of data to an entity within the United States of America and under the jurisdiction of the Government of the United States of America is Section 12 und 13 of the DSG 2000.
4. It has to be mentioned that Austrian law also peculiarly grants a right to protection of personal data to other entities than natural persons. Data of all kinds of bodies of public and private law (e.g. companies with limited liability, joint stock corporations, cooperatives, partnerships, non-profit associations, cities and other local communities), including typical business data, are in principle as well protected as for example name, date of birth, monthly income and credit rating of a human.
5. Since the transmission of personal data to U.S. Federal Authorities is outside the scope of the “*Safe Harbor*” rules, a reporting party (data controller) under Austrian jurisdiction has got three options to legalize such a transmission:
 - a. The prior consent of the non-reporting counterparty as a data subject (“*without any doubt*”, Sect 12 (3) 5 DSG 2000, and revocable “*at any time*”, Sect 8 (2) 2 DSG 2000) or
 - b. the fact that transmission is “*authorised by regulations that are equivalent to a statute in the Austrian legal system and are immediately applicable*” (Sect 12 (3) 3 DSG 2000, note that there is a serious element of uncertainty whether foreign, here U.S., unilateral regulations issued by an administrative authority meet the terms of this provision), or
 - c. a permit of the DSK authorizing such transmission of data (Sect 13 (1) DSG 2000).
6. For a transmission of personal data without being authorized according to 5. a., b. or c. the reporting party could be fined with up to 10.000 Euros (Sect 52 (2) 2 DSG 2000).
7. Additionally a reporting party (data controller) under Austrian jurisdiction would (in compliance with Sect 17 et seqq DSG 2000) have to register the fact, that such transmissions will be made, in the public Data Processing Register (DVR) kept by the DSK.
8. We advise all members of the ISDA under our jurisdiction who want to apply for the permit mentioned under 6 c above to do so as soon as possible (at least six month before June 30th 2014; six months is the maximum deadline set for the authority for a

decision in formal proceedings under Austrian administrative law). We are not permitted to make any forecast if such a permit can be granted, but there are some precedent cases concerning certain duties of financial institutions under the Sarbanes-Oxley-Act (e.g. data received by means of a "Whistle-Blower-Hotline", DSK, 05.12.2008, K178.274/0010-DSK/2008, www.ris.bka.gv.at/dsk/).

9. Please note that the DSK will be replaced by a new authority, the Datenschutzbehörde or Data Protection Authority, by January 1st 2014 (by amendment to the DSG 2000, Bundesgesetzblatt/Federal Law Gazette I Nr. 83/2013). The powers and duties of the new authority will remain unchanged.
10. Any binding decision concerning the questions put up and discussed under 1.-7. above would have to be made in formal proceedings before the DSK (e.g. following an application for the permit for data transmission to the CTFC). Please take note of the fact that such proceedings, including any applications in writing, have to be made in German language.
11. Under the following link you (or your legal advisors) can download a PDF with an unofficial, non-certified translation/bilingual text of the DSG 2000:
http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1999_1_165/ERV_1999_1_165.pdf

Yours sincerely,

29. Juli 2013
Für die Datenschutzkommission
Das stellvertretende geschäftsführende Mitglied:
KÖNIG

Signaturwert	v3XJYfJ9ID8QgZdFeLVfAwzqlmD0/sFenxdXocgqriQ2h6YFQ/SrnceLY1ujVPzCNVO sEXnwZefpWVT0zHFPRv8s2IA4V79N8+MWoJNteVrHgauJIIGTOOT7BmOEFgC3mvfDp fnwVXvPk0NrHX1dDFi4Ou1JOTTF9m7iY34k+m2UaVo4BsDh9/4fKdgnKykdmpLu/tVG X5itOiZO+3pBNuMXbNp1aMBG7eQBj2ThfXAX1v3eiQ3KglA13wsn8cZShmNhT4zDjk8 zbtSh8UT1vwNmHCOz1Dm/FwZsJsrDULe8NAyUU6Ts0NfJCEtd6h7uSGQEA28+OoRERq 7T+shYQ==	
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	Datum/Zeit-UTC	2013-07-30T08:09:51+02:00
	Aussteller-Zertifikat	CN=a-sign-corporate-light-02,OU=a-sign-corporate- light-02,O=A-Trust Ges. f. Sicherheitssysteme im elektr. Datenverkehr GmbH,C=AT
	Serien-Nr.	543759
	Methode	urn:pdfsigfilter:bka.gv.at:binaer:v1.1.0
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