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From: To:	General Secretariat of the Council Antici Group (Simplification)
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Subject:	Non-paper SPAIN: amending Article 49 of the GDPR in relation to the exchange of tax data (Omnibus VII-Digital Omnibus)

Please find below the ES's non-paper amending Article 49 of the GDPR in relation to the exchange of tax data, ahead of the AGS meeting of 24 April 2026 under "AOB".

ES NON PAPER

Amendment to clarify and specify the scope of the derogation for important reasons of public interest laid down in Article 49 of Regulation (EU) 2016/679, as regards international data transfers carried out in the context of periodic exchanges of information between public authorities

Option 1

Article 49

Derogations for specific situations

(…)

4. The public interest referred to in point (d) of the first subparagraph of paragraph 1 shall be recognised in Union law or in the law of the Member State to which the controller is subject.

This shall include cases where the transfer is necessary for the implementation, application or compliance with international or administrative agreements on mutual assistance or cooperation concluded by a Member State, including cases where personal data is exchange on a large scale and in a systematic manner, and where such agreements do not provide for appropriate safeguards within the meaning of Article 46. In such cases, Member States shall ensure that appropriate safeguards for the protection of data subjects are provided for under Union law or the law of the Member State, including personal data in transit as well as after such transaction has taken place.

Personal data shall not be transferred where the competent authority responsible for the transfer considers that the rights and freedoms of the data subject concerned override the public interest pursued by the transfer.

Transfers based on this Article shall be documented.

Option 2

Article 49

Derogations for specific situations

1. (…)

Where a transfer could not be based on a provision in Article 45 or 46, including the provisions on binding corporate rules, and none of the derogations for a specific situation referred to in the first subparagraph of this paragraph is applicable, a transfer to a third country or an international organisation may take place only if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data. The controller shall inform the supervisory authority of the transfer. The controller shall, in addition to providing the information referred to in Articles 13 and 14, inform the data subject of the transfer and on the compelling legitimate interests pursued.

The requirement that the transfer be non-repetitive shall not apply to transfers based on point (d) of the first subparagraph, where such transfers are necessary for important reasons of public

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interest recognised in Union law or in the law of a Member State, including transfers carried out pursuant to international or administrative agreements on mutual assistance or cooperation.

Justification of the amendment

The purpose of this amendment is to clarify and specify the scope of the derogation for important reasons of public interest laid down in Article 49 of Regulation (EU) 2016/679, in particular as regards international data transfers carried out in the context of periodic exchanges of information between public authorities.

International data exchange for tax purposes constitutes a necessary instrument to fight tax fraud in a globalised World. Directive 2011/16/EU recognizes this importance stating that

"(1) The Member States' need for mutual assistance in the field of taxation is growing rapidly in a globalised era. There is a tremendous development of the mobility of taxpayers, of the number of cross-border transactions and of the internationalisation of financial instruments, which makes it difficult for Member States to assess taxes due properly. This increasing difficulty affects the functioning of taxation systems and entails double taxation, which itself incites tax fraud and tax evasion, while the powers of controls remain at national level. It thus jeopardises the functioning of the internal market."

This need for the exchange of tax relevant data must be balanced with the protection of personal data, which plays an essential role as it affects a fundamental right recognized in the Charter of Fundamental Rights of the European Union.

Within this context, the GDPR recognizes the public interest of personal data exchanges for tax purposes when it states that

(101) Flows of personal data to and from countries outside the Union and international organisations are necessary for the expansion of international trade and international cooperation. The increase in such flows has raised new challenges and concerns with regard to the protection of personal data. However, when personal data are transferred from the Union to controllers, processors or other recipients in third countries or to international organisations, the level of protection of natural persons ensured in the Union by this Regulation should not be undermined, including in cases of onward transfers of personal data from the third country or international organisation to controllers, processors in the same or another third country or international organisation. In any event, transfers to third countries and international organisations may only be carried out in full compliance with this Regulation. A transfer could take place only if, subject to the other provisions of this Regulation, the conditions laid down in the provisions of this Regulation relating to the transfer of personal data to third countries or international organisations are complied with by the controller or processor.

(102) This Regulation is without prejudice to international agreements concluded between the Union and third countries regulating the transfer of personal data including appropriate safeguards for the data subjects. Member States may conclude international agreements which involve the transfer of personal data to third countries or international organisations, as far as such agreements do not affect this Regulation or any other provisions of Union law and include an appropriate level of protection for the fundamental rights of the data subjects.

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(112) Those derogations should in particular apply to data transfers required and necessary for important reasons of public interest, for example in cases of international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities, between services competent for social security matters, or for public health, for example in the case of contact tracing for contagious diseases or in order to reduce and/or eliminate doping in sport.

In practice, a significant number of international data transfers take place in the implementation of international or administrative agreements on mutual assistance or cooperation, notably in the fields of taxation, customs, financial supervision or comparable areas of public administration. This includes, inter alia, agreements such as FATCA, the OECD Common Reporting Standard (CRS), as well as frameworks relating to digital platforms and crypto-assets. Although such exchanges are not "automated" in a technical sense, given their nature, such transfers may necessarily take place on a recurring basis, which calls for legal clarity as to the applicability of the public interest derogation in Article 49(1)(d), subject to strict necessity and appropriate safeguards. Article 49(4) of the GDPR provides that important reasons of public interest may be recognised in Union law or in the law of the Member State as a basis for derogation from the general regime governing international data transfers.

In this context, the protection of personal data warrants particular attention in relation to such periodic or systematic exchanges, as they are based on an abstract and ex ante assessment of the necessity and proportionality of the data exchange for clearly defined public policy objectives, such as taxation, rather than on an individualised, case-by-case assessment. At the same time, these exchanges pursue objectives of important public interest that are expressly recognised under Union law and the laws of the Member States and are essential for the effective functioning of those public policies.

Such recurring transfers remain subject to the principles of necessity, proportionality, data minimisation and accountability, and must be accompanied by appropriate safeguards ensuring a high level of protection.

Experience gained in the application of the GDPR has revealed a degree of legal uncertainty as to the appropriate legal basis for such transfers where, in the absence of an adequacy decision, the relevant international or administrative agreement does not itself provide for the appropriate safeguards referred to in Article 46 of the Regulation. This uncertainty has been further compounded by judicial interpretations questioning whether the continued application of pre-existing international agreements under Article 96 of the GDPR can be maintained indefinitely, potentially requiring Member States to renegotiate agreements that remain necessary for the effective exercise of core public functions.

The proposed amendment clarifies that the important public interest referred to in Article 49(1)(d) explicitly encompasses situations in which a transfer of personal data is necessary for the implementation, application or compliance with international or administrative agreements on mutual assistance or cooperation concluded by a Member State. It further specifies that, where such agreements do not themselves provide for appropriate safeguards for the protection of personal data, Member States must ensure that such safeguards are provided for under Union law or the law of the Member State concerned.[1]

[1] Only for Option 1

In addition, the amendment clarifies that transfers necessary for important reasons of public interest under Article 49(1)(d), including those carried out pursuant to international or administrative cooperation agreements, may in practice take place on a recurring basis. It therefore specifies that the requirement of non-repetitiveness, which applies to the residual ground of compelling legitimate interests, should not be understood as limiting such public interest transfers. This clarification does not affect the exceptional nature of Article 49 derogations, which remain subject to strict necessity, proportionality and appropriate safeguards ensuring a high level of protection of personal data.

In this respect, the approach reflected in the amendment is consistent with solutions already recognised in Union law, notably in Article 37(1) of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016. That provision allows transfers of personal data for important public interest purposes, such as the prevention and combating of crime, in the absence of an adequacy decision, where appropriate safeguards are provided either in a legally binding instrument or based on a documented assessment of all the circumstances surrounding the transfer. Without affecting the distinct scope and objectives of the GDPR, the present amendment similarly clarifies that transfers based on important reasons of public interest may rely on safeguards embedded in the relevant agreement or, where such safeguards are absent, on appropriate safeguards laid down in Union or national law, following a prior and documented assessment by the competent authority as part of the data protection impact assessment, carried out, for example, in the context of the negotiation of the agreement.

This approach reflects the legal reality that, in such circumstances, safeguards established under Union or Member State law bind the authorities of the transferring Member State and cannot, by their nature, impose obligations on the authorities of the third-country recipient. Accordingly, those safeguards must be designed to operate primarily at the level of the transferring authority and may include, in particular, robust mechanisms of prior verification, data minimisation, proportionality assessments, and effective oversight before any transfer takes place, in line with the principles of accountability and data protection by design.

The amendment therefore seeks to address the need to balance a high level of protection of personal data with the equally legitimate requirement of effective international cooperation in areas of overriding public interest. It aims to ensure that such cooperation can continue to take place within a clear and predictable legal framework, while maintaining the safeguards required by the GDPR and fully respecting the rights of data subjects. It also contributes to avoiding diplomatic tensions linked to concerns about the extraterritorial reach of the Union's data protection requirements, while ensuring that a high level of protection for data subjects is preserved within the Union's legal order.

The proposed amendment constitutes a targeted technical clarification intended to improve legal certainty and ensure a consistent interpretation of Article 49(4) in conjunction with Article 44 of the GDPR. It does not introduce new substantive derogations nor lower the level of protection afforded to data subjects but clarifies the source and articulation of the safeguards applicable in cases of transfers based on important public interest grounds. By reducing interpretative uncertainty and avoiding implicit or impracticable requirements for international or administrative agreements, the amendment supports a more effective, proportionate and coherent application of the existing framework.

Finally, this clarification fully aligns with the broader objective of regulatory simplification (decluttering) pursued by the present proposal. By clarifying the functional relationship between

Articles 46 and 49 and providing a clear legal basis for long-standing administrative practices, the amendment reduces complexity, enhances legal certainty and facilitates a more consistent and effective application of the Regulation, without lowering the level of protection of personal data within the Union.

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