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Spontaneous sharing of information pursuant to sections 61a, 92c of the Act on International Cooperation in Criminal Matters [*Gesetz über die internationale Rechtshilfe in Strafsachen*, IRG]

The purpose of sections 61a, 92c IRG is to authorise “spontaneous sharing of information”, i.e. transmission of data without prior request. Section 61a IRG is the general legal basis for spontaneous sharing of information. Section 92c IRG is the special provision at European level, to the extent provided for by an international agreement or Framework Decision 2006/960/JHA. However, section 61a IRG in conjunction with section 91 (1) IRG is also applicable to Member States of the EU to the extent that section 92c IRG does not contain any specific provisions.

Regarding section 61a IRG:

Section 61a (1) IRG regulates the requirements for spontaneous transmission of information by German courts and public prosecution offices. The provision applies solely to “personal data from criminal proceedings”.

A transmission may be made only to “public authorities” of another State or to intergovernmental or supranational authorities.

Section 61a (1) no. 1 IRG allows data to be shared spontaneously only if the transmission “would be permissible without request to a German court or to a German public prosecution office”. This is particularly aimed at preventing German requirements from being circumvented by transmission and return transmission of personal data.

The preconditions for spontaneous sharing of information for foreign criminal proceedings are specified in section 61a (1) no. 2 a) IRG. Thus, a transmission is only permitted if facts warrant the assumption that the transmission is necessary in order to prepare a request for legal assistance for the purpose of prosecution or execution of a sentence, and the criminal offence at issue is punishable under German law by a maximum penalty of more than five years of imprisonment. This means that the information cannot be directly used as evidence in the foreign proceedings. Lastly, there should be no legal bar to arranging the legal assistance – it must be possible for the German authorities to comply with the request for mutual legal assistance.

If an adequate level of data protection is ensured in the receiving State in accordance with section 61a (1) 2nd sentence IRG, this provision stipulates that the range of relevant criminal offences can also be expanded to encompass offences of “significant gravity”, in deviation from section 61a (1) no. 2 a) IRG.

In contrast to section 61a (1) no. 2 a) IRG, section 61a (1) no. 2 b) IRG does not require that information be shared only for criminal prosecution purposes; it is preventive in nature. It must be necessary in the individual case to avert an existing danger to the existence or the security of the State, or to the life, limb or freedom of a person, or to property of significant value, protection of which is in the public interest, or to prevent a criminal offence of the type referred to in section 61a (1) no. 2 a) IRG.

Pursuant to section 61a (1) no. 3 IRG, the receiving authority in the foreign country must be competent to implement the appropriate measures under section 61a (1) no. 2 IRG.

Section 61a (2) IRG also lays down conditions for transmitting information. The foreign State must observe the time limits pursuant to German law for data deletion and for review of data deletion, and the use of the transmitted data is subject to strict restrictions due to data protection. If an error pursuant to section 61a (4) IRG occurs in the transmission of data, the transmitted data must be immediately deleted or corrected by the receiving State upon receipt of respective notification by the Federal Republic of Germany.

Lastly, section 61a (3) IRG prohibits transmission of information if it is evident that the interests of the person affected by the data transmission outweigh the receiving State's interest in receiving the information.

Regarding section 92c IRG:

As a rule, the addressees of the provision are public authorities within the meaning of section 2 of the Federal Data Protection Act [*Bundesdatenschutzgesetz*, BDSG]. Potential recipients must be public authorities of a Member State of the European Union or a Schengen-Associated State as well as bodies and institutions of the EU itself.

Spontaneous data transmission pursuant to section 92c (1) IRG is permitted only for data that give rise to the suspicion that an offence has been committed.

Like section 61a IRG, section 92c (1) IRG allows data to be shared spontaneously only if transmission of data would be permissible without making a request to a German court or to a German public prosecution office.

In contrast to the stricter requirement of necessity under section 61a (1) no. 2 IRG, the transmission is only required to be useful in initiating criminal proceedings in the receiving State or assisting criminal proceedings already pending there (section 92c (1) no. 2 a) and b) IRG). In essence, authorisation to transmit information spontaneously at the European level does not require that the criminal offence be of a particular seriousness, but it does exclude the spontaneous sharing of data for preventive reasons.

Lastly, pursuant to section 92c (1) no. 3 IRG, the authority to whom the data are transmitted must have jurisdiction for the measures under no. 2.

With regard to the procedure, transmission prohibitions, and correction and deletion obligations, section 92c (2) IRG refers to section 61a (2-4) IRG.