

Data Transfers Under GDPR: Where Are We Now?

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Background

- How did we get here?
 - GDPR allows international transfers only if:
 - European Commission issues an “adequacy decision”; or
 - Transferring parties implement approved “transfer tools” (e.g., Standard Contractual Clauses, EU-U.S. Privacy Shield, Binding Corporate Rules)
 - *Schrems II*
 - Invalidated EU-U.S. Privacy Shield
 - Data exporters may need to implement “supplemental measures” in addition to GDPR-approved “transfer tools”
 - Silent as to when and how to implement such “supplemental measures”

EDPB Issues Post-*Schrems II* Guidance

- European Data Protection Board (“EDPB”) picks up where *Schrems II* left off
- Guidance provides step roadmap for data exporters to follow to:
 - (i) determine whether transfers to third countries provide adequate safeguards under the circumstances; and
 - (ii) if not, the “supplemental measures” data exporters can implement to shore up protection

Steps 1 & 2

- **Step 1: Know Your Transfers**
 - Ensure you are fully aware of your transfers by recording and mapping them, including onward transfers
- **Step 2: Identify the Transfer Tools You Are Relying On**
 - Transfers to third countries covered by an adequacy decision do not require “supplemental measures”
 - Regardless of “transfer tool,” transferred personal data must have benefit of an essentially equivalent level of protection.

Steps 3 & 4

- **Step 3: Assess Whether the Transfer Tool You Are Relying on Is Effective in Light of All Circumstances of the Transfer**
 - Assessment should focus primarily on third country legislation (e.g., FISA or other surveillance schemes) that may undermine level of protection and actors participating in the transfer
- **Step 4: Identify and Adopt Supplementary Measures**
 - Supplemental measures include technical, contractual, and organizational measures

Steps 5 & 6

- **Step 5: Take Any Formal Procedural Steps**
 - E.g., seek approval from a supervisory authority before transfer
 - Generally, no formal steps are needed if using unmodified SCCs
- **Step 6: Re-Evaluate at Appropriate Intervals**
 - Obligation to ensure adequacy is an ongoing
 - EDPB does not specify a time period for periodic re-evaluation

Impact on Data Exporters in EU

- Potential fines, but also suspension of transfers
- Transfers to U.S. challenging due to surveillance regimes – likely need *technical* measures in addition to contractual/organisational measures
- Impact on BCRs and ad hoc clauses

EDPB's Supplemental Measures

These measures are . . .

- **Supplemental** – must be combined with SCCs or other mechanism
- **Non-exhaustive**
- **Subject to further assessment** – adequacy of each implementation must be considered on case-by-case basis

Technical Measures: Scenarios Where Effective

- Encrypted backups
- Encrypted data merely transiting through country
- Protected recipient
- Pseudonymization
- Split or Multi-Party Processing

Technical Measures: Scenarios Where Not Effective

- Cloud services that require access
- Remote access for business purposes

Contractual Measures

- Require specific technical measures
- Transparency (e.g., notification by importer of legal requests; backdoor reps; warrant canary)
- Obligations to take actions (e.g., challenging legal requests)
- Empowering data subjects (e.g., consent requirements; legal assistance to data subjects)

Organisational Measures

- Policies and procedures to govern transfers
- Transparency and accountability measures
- Access controls/data minimization
- Adopting standards and best practices (e.g., ISO norms; ENISA)

Final Takeaways

- Vendors should become familiar with the applicability of surveillance regimes and other laws that impact data transfers or operations
- Data mapping increasingly important
- Look for solutions beyond four corners of contract
- Need to plan ahead for continually changing environment

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