Freedom of Motion?

Global Developments in International Data Transfer

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International Data Transfer

Agenda



- Baseline - International Data Transfer and the GDPR
- Schrems II and Pursuant Guidance
- Asia Pacific
- India
- Key Takeaways

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General Data Protection Regulation ("GDPR")

Transfers of Personal Data to 3rd Countries – Article 45

Adequacy

A transfer of personal data to a third country or an international organization may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organization in question ensures an adequate level of protection

Countries with Adequacy

Andorra	Japan
Argentina	Jersey
Canada	New Zealand
Faroe Islands	Switzerland
Guernsey	Uruguay
Israel	South Korea *
Isle of Man	UK **

* On 30 March 2021, adequacy talks were concluded with South Korea. The European Commission will now proceed with launching the decision-making procedure to adopt the adequacy decision

** On 19 February 2021, the Commission launched the procedure for the adoption of an adequacy decision for transfers of personal data to the United Kingdom

General Data Protection Regulation ("GDPR")

Transfers of Personal Data to 3rd Countries – Article 46

Appropriate Safeguards

In the absence of an adequacy decision pursuant to Article 45, a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

What are Appropriate Safeguards?

- Legally binding and enforceable instrument between public authorities
- Binding Corporate Rules (Art. 47)
- Standard Contractual Clauses (Art. 92)
- Approved Code of Conduct (Art. 40)
- Certification of processing operations (Art. 42)

General Data Protection Regulation ("GDPR")

Transfers of Personal Data to 3rd Countries – Article 49

Derogations

In the absence of an adequacy decision pursuant to Article 45(3), or of appropriate safeguards pursuant to Article 46, including binding corporate rules, a transfer or a set of transfers of personal data to a third country or an international organization shall take place only if certain conditions are met.

Narrowly interpreted derogations

- Explicit Consent (high threshold for valid consent)
- Performance of contract with or in the interest of a data subject (occasional transfers, necessity)
- Public interest (not for systematic transfers)
- Establish, exercise or defend legal claims (occasional transfers)
- Vital interest (not valid for clinical research)
- Public register

Schrems II

Background

- **2013**: Schrems complained to Irish DPA about Facebook's transfers of personal data to the U.S. under the Safe Harbor mechanism
- **2015**: Irish High Court referral to the CJEU resulted in the invalidation of Safe Harbor
- **2015/6**: Schrems reformulated his complaint to challenge Facebook's transfers of personal data to the U.S. under the SCCs
- **2018**: Irish High Court referred a number of questions to the CJEU for a preliminary ruling including:
  - Whether the Privacy Shield constitutes a finding of adequacy, binding on all data protection authorities and the courts of member states
  - Whether transfers of personal data to the U.S. pursuant to the SCCs breach article 7 (privacy) and article 8 (data protection) rights under the Charter
  - Whether the laws and practices in third countries are relevant when considering whether SCCs can be relied on to legitimise transfers of personal data to third countries



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