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EUROPEAN DATA PROTECTION BOARD

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Feedback on Recommendations 01/2020

1. GENERAL OBSERVATIONS

This feedback aims to bring clarity on the fact that (according to §6) the Recommendations 01/2020 are a roadmap of the steps to take in order to find out if a data exporter needs to put in place supplementary measures to be able to legally transfer data outside the EEA. “Data exporter” in that document means the controller or processor, processing personal data within the scope of application of the GDPR (including processing by private entities and public bodies) ***when transferring data to private bodies***. As for transfers of personal data carried out between public bodies, specific guidance is provided for in the Guidelines 2/2020 on Articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies.

In light of the automatic exchange of information at international level under the CRS on the one hand, and the rules on data protection which have undergone a number of changes resulting from the entry into force on 25 May 2018 of the General Data Protection Regulation (EU) 2016/679 (hereinafter referred to as "GDPR") on the other hand, too often, the rules that apply for private bodies, that do not rely on international agreements or treaties, are transposed to the situations wherein public bodies transfer data necessary for important reasons of public interest.

Once more, this document provides no clarity on what provisions of GDPR can form the legal basis for transfer of personal data (article 46, 48 or 49?), and to what different lengths the derogations under GDPR exactly extend when it comes to transfers to private bodies, opposite transfers between public bodies. The cascade of possibilities in Chapter V of the GDPR will be looked at and the relevant aspects of the conditions in article 49 GDPR will be highlighted.

In addition, article 48 GDPR concerning “transfers on disclosures not authorised by Union Law” as a legal ground that is without prejudice to other grounds for transfer pursuant to

Chapter V of GDPR on "Transfers of personal data to third countries or international organisations" will be looked into. Below, further details are provided on the view that this article is a standalone legal basis for e.g. the transfer of CRS-data (equivalent of DAC2 EOI within the EU).

Also, EU or Member State law may restrict by way of a legislative measure the scope of the obligations and rights of data subjects, but the current measures in the field of data protection provide sufficient guarantees for the tax administration to ensure that the transfer of personal data with third countries have long preceded GDPR, although at present, stricter conditions for legal restrictions have been introduced with GDPR (article 23, paragraph 2 GDPR). The Recommendations don't mention anything on this subject, although the division between private and public bodies when it comes to restrictions such as important objectives of general public interest, is paramount.

Finally, the point of view of the European Data Protection Board (EDPB) and how that influences AEOI under CRS, as they all contribute to the assessment that the level of data protection is in lign with GDPR when exchanging CRS-data.

2. Legal framework

It is noted that the interpretation of GDPR provisions should be without prejudice to international agreements concluded between the Union and third countries. Those agreements regulate 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, but they have to include an appropriate level of protection for the fundamental rights of the data subjects[1]. In other words, the effective functioning of international agreements should not be impeded by an overly strict interpretation of GDPR.

a. Cascade for transfers of personal data to third countries

In principle, GDPR has established a cascade system for transfers of personal data to third countries.

First, article 45 GDPR covers transfers on the basis of an adequacy decision. The issues we'd like to get clarity on, are not covered by such an adequacy decision, and for that reason, this article will not be discussed here.

In the absence of an adequacy decision, article 46 GDPR prescribes that a transfer of personal data to a third country may be possible 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.

Those appropriate safeguards may be provided for, without requiring any specific authoris-ation from a supervisory authority, by a legally binding and enforceable instrument between public authorities or bodies.[2]

[1] Recital (102) GDPR
[2] Article 46 para 2 (a) GDPR
The possibilities for EOI under article 46 are much broader than what is necessary for CRS: transfers may even be carried out by public authorities or bodies with public authorities or bodies in third

In this context, it should be emphasized that treaties and exchange of information instruments[3] contain strict provisions that require information exchanged to be kept confidential and limit the persons to whom the information can be disclosed and the purposes for which the information may be used.[4] Following the above, the difference between transfers between public bodies, for which article 46 para 1 and 2 (a) is a sufficient legal basis, and transfers to private bodies, where article 46 GDPR may not suffice, should be more clearly emphasised.

Furthermore, the derogations for specific situations of article 49 GDPR apply in the absence of any adequacy decision or appropriate safeguards. The article lays down the non-cumulative conditions on which a transfer or a set of transfers of personal data to a third country *shall* take place. One of those conditions in article 49 para 1 d) is the necessity for important reasons of public interest. That public interest has to be recognised in Union law or in the law of the Member State to which the controller is subject.[5] GDPR expressly acknowledges international data exchange between tax administrations as an example of data transfers, required and necessary for important reasons of public interest[6].

Moreover, the second subparagraph of the first paragraph of article 49 GDPR provides with a last resort where a transfer could not be based on a provision in article 45 or 46 GDPR, *and* none of the derogations for a specific situation referred to in the first subparagraph of article 49 GDPR are applicable, a transfer to a third country or an international organisation may still take place under certain conditions.

Given the cumulative nature for reverting to that last resort and given that a derogation for a specific situation under Article 49 para 1 (d) of the AVG is applicable, the conditions set out in the second subparagraph of paragraph 1 of article 49 GDPR are not relevant here and for that reason, will not be discussed in detail.

b. Transfers or disclosures not authorised by Union law

Article 48 GDPR stipulates that *"any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner if based on an international agreement [..]in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter.* (own highlighting)

This provision is not copied from the (repealed) Directive 95/46/EC, but its origin can be found in the recitals (30)[7] and (56) to (58)[8], as well as in article 26 para. 1 d) of said Directive.

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countries, including on the basis of provisions to be inserted into administrative arrangements[2], providing for enforceable and effective rights for data subjects. Authorisation by the competent supervisory authority should be obtained when the safeguards are provided for in administrative arrangements that are not legally binding[2].

[3] Those are/can be the legal bases for AEOI

[4] OECD (2017), *Standard for Automatic Exchange of Financial Account Information in Tax Matters, Second Edition*, OECD Publishing, Paris, *http://dx.doi.org/10.1787/9789264267992-en*, p.13.

[5] Article 49 para 4 GDPR

[6] Recital (112) GDPR

[7] *In order to be lawful, the processing of personal data must […] be necessary […] as a legal requirement, or for the performance of a task carried out in the public interest or in the exercise of official authority, […]*

[8] *(56) […] whereas the adequacy of the level of protection afforded by a third country must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations;*

Article 26 specifies on what conditions a derogation may take place in case a third country does not ensure an adequate level of protection within the meaning of Article 25, para. 2. It actually does not mean there is no adequate level of protection, but how the level of protection afforded by a third country shall be assessed, can differ from the requirements in article 25, para. 2. More specifically, article 26 para. 1 d) acknowledges the mere existence of a legal requirement (such as CRS legislation) to be sufficient grounds for data processing when it concerns an important public interest:

> *By way of derogation from Article 25 and save where otherwise provided by domestic law governing particular cases, Member States shall provide that a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25(2) may take place on condition that:*
>
> *[…]*
>
> *(d) the transfer is necessary or legally required on important public interest grounds,[…]*

In other words, the repealed Directive left space for the legislator to assess if the importance of a public interest outweighs the need for an adequate level of protection to be arranged exactly according to the modalities provided for in the repealed Directive. It is undisputed that international transfers of data between tax administrations is an “important public interest” in the sense of article 26 of the repealed Directive, as recital 58 of that Directive explicitly mentioned it.

At present, article 48 GDPR more clearly reiterates the freedom for the legislator to assess how an adequate level of protection should be arranged in case of concluding an international agreement, which aligns with the principles of sovereignty, as it would be impossible to impose EU legislation to third countries. It is not the way an adequate level of protection should be arranged that Member States can agree on with third countries, but only the fact that data protection should reach a certain adequate level.

However, for the transfer of information to be based on this provision, the conditions set out in Article 48 must be met. In particular, it must concern:

- any decision of an administrative authority of a third country:
  The request of information or the notification for exchange of information from a third country is the decision of an administrative authority within the meaning of article 48 GDPR.

- requiring transfers or disclosure of personal data:
  The transfers of personal data to third countries cover, among other things, the financial data of natural persons. For the sake of completeness, it can be noted that transfers of personal data to third countries concern more data than just data of natural persons (see Article 4, 1 GDPR for the definition of personal data), given that it also concerns the financial data of, for example, companies and legal entities. This is important when considering the interests of natural persons against the public interest that serves the CRS (see below).

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(57) Whereas, on the other hand, the transfer of personal data to a third country which does not ensure an adequate level of protection must be prohibited;
(58) Whereas provisions should be made for exemptions from this prohibition in certain circumstances […],where protection of an important public interest so requires, for example in cases of international transfers of data between tax or customs administrations […]

- The enforcement of that administrative decision is based on an international agreement:
  The basis of the AEOI is in general the MAC and a MCAA CRS (or a bilateral agreement, which is just as well an international agreement)

From the foregoing it is undeniable that **transfers of personal data between public bodies from EU Member States to third countries** can take place legitimately on the basis of Article 48 GDPR, since all the conditions in that article are met. This possibility has not been stipulated anywhere, although it is an irrefutable difference between transfers from and to public bodies, contrary to transfers of personal data involving private bodies.

c. Restrictions on the rights of data subjects

It is clear that transfers of personal data between public bodies holds a restriction to the rights of data subjects, that is incomparable to the restrictions to those rights when the transfers involve private bodies.

When it comes to transfers of personal data to third countries, the general principle laid down in article 44 GDPR encompasses at the end:

> *All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined.*

In short, this means that transfers between public bodies are bound by the conditions set out in the GDPR for restrictions on the rights of data subjects to be legitimate.

In that regard, reference should be made to the old article 13 of the Directive 95/46/EU which allowed for exemptions and restrictions on the obligations and rights provided for in the repealed Directive. The conditions for such restrictions were general and the interpretation could take various forms. At present, the restrictions to the scope of the obligations and rights provided for in articles 12 to 22 GDPR are laid down in article 23 GDPR containing more stringent conditions in a more extensive and detailed second paragraph. The relevant passages from the aforementioned article read as follows:

> *1. Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles […], when such a restriction respects the essence of the fundamental rights and freedoms and is <u>a necessary and proportionate measure</u> in a democratic society to safeguard:*
>
> *[…]*
>
> *e) other <u>important objectives of general public interest</u> of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and **<u>taxation matters</u>**, public health and social security;*
>
> *[…]*
>
> *2. In particular, any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to:*
>
> *(a) the purposes of the processing or categories of processing;*

(b) the categories of personal data;

(c) the <u>scope of the restrictions introduced</u>;

(d) the <u>safeguards to prevent abuse or unlawful access or transfer</u>;

(e) the specification of the controller or categories of controllers;

(f) the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;

(g) the risks to the rights and freedoms of data subjects; and

(h) the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction.." (own highlighting)

For tax administrations, it is paramount that a clear distinction is made between transfers of personal data, solely involving public bodies, or such transfers also involving private bodies. Exceptions to data protection for "public" transfers (read transfers from public bodies to public bodies) find their legal basis in several places, e.g. article 25 DAC-Directive[9], in combination with domestic CRS legislation, is a sufficient legal basis to justify the exceptions to data protection for AEOI. The aforementioned article 25 clearly states the following in the first paragraph:

"All exchange of information pursuant to this Directive shall be subject to the provisions implementing Directive 95/46/EC. However, Member States shall, for the purpose of the correct application of this Directive, restrict the scope of the obligations and rights provided for in Article 10, Article 11(1), Articles 12 and 21 of Directive 95/46/EC to the extent required in order to safeguard the interests referred to in Article 13(1)(e) of that Directive."

The interests referred to in article 13, para 1 e) of the (repealed) Directive 95/46/EU, are the important economic or financial interest of a Member State or of the European Union, including taxation matters, as reflected in the article 23 GDPR quoted above. Thus, the European legislator has stated that article 23 para 1 e) GDPR, being the replacement of article 13, para 1 e) of the Directive 95/46/EU, covers AEOI.

Domestic legislation implementing the DAC-Directive, and all the subsequent changes to it, such as the introduction of CRS by DAC 2[10], also complies with the (new) conditions of article 23 GDPR.

Member States have communicated to the Commission the text of the main provisions of national law which they adopt in the field covered by DAC2[11]. DAC2 respects the fundamental rights and observes the principles which are recognised in particular by the Charter of Fundamental Rights of the European Union, including the right to the protection of personal data[12]. As the implementation of DAC2 and of the CRS (AEOI with third countries) is established in one domestic law, the conditions set out in article 23 GDPR, are equally in place for data transfers to third countries. Moreover, the domestic legislative measures that contain specific provisions on the purposes, scope, safeguards etc. of the

[9] Article 25 of the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation (in short DAC-Directive) is the provision on data protection

[10] By Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation

[11] Article 2 para 3 Council Directive 2014/107/EU of 9 December 2014

[12] Recital (17) of Council Directive 2014/107/EU of 9 December 2014 (DAC2)

restrictions introduced on the rights of data subjects, are being reviewed on the level of the OECD as well, which also provide for equivalent conditions[13].

For the sake of completeness, it should be noted that a number of those conditions in Article 23, paragraph 2 GDPR were already met without additional legislative action, given that many procedural guarantees have already been provided in tax codes to safeguard the rights of the taxpayer during tax inspections.

Taking into account the reasoning as explained above, it is paramount that the recommendations 01/2020 delineate and emphasize more accurately the clear differences between transfers of personal data involving solely public bodies, vis-à-vis such transfers involving private bodies. Since the latter does not rely on international agreements, solid and reviewed implementations of international standards, the approach in the area of data protection should profoundly differ as well.

3. EDPB

According to Article 49 para 4 GDPR, the public interest must be "recognised in Union law or in the law of the Member State to which the controller is subject". In its guidelines, the European Data Protection Board (EDPB) stresses the following:

> *« (…) the derogation only applies when it can also be deduced from EU law or the law of the member state to which the controller is subject that such data transfers are allowed for important public interest purposes including in the spirit of reciprocity for international cooperation. The existence of an international agreement or convention which recognises a certain objective and provides for international cooperation to foster that objective can be an indicator when assessing the existence of a public interest pursuant to Article 49 (1) (d), as long as the EU or the Member States are a party to that agreement or convention ».*[14]
>
> *« Where transfers are made in the usual course of business or practice, the EDPB strongly encourages all data exporters (in particular public bodies) to frame these by putting in place appropriate safeguards in accordance with Article 46 rather than relying on the derogation as per article 49 (1) (d) »*[15]

We agree with the interpretation by the EDPB that the application of Article 46 GDPR takes precedence over Article 49 GDPR. The idea that article 49 needs to be restricted to specific situations, which would exclude e.g. AEOI, however, is an interpretation of that article, which would add a condition to the law. Below, it is clarified that any transfer of personal data to third countries, even an AEOI, falls within the scope of “specific situations”.

Article 46 GDPR cannot exclude the derogations for specific situations under Article 49 GDPR. Moreover, those important reasons of public interest are even more overriding in the case of AEOI, since only a very small segment of CRS-information resides in the scope of Chapter V of GDPR. After all, a large part of the exchanges takes place within Europe, and the exchanges with third countries do not, to a considerable extent, concern natural persons.

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[13] OECD (2017), *Standard for Automatic Exchange of Financial Account Information in Tax Matters, Second Edition*, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264267992-en

[14] Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679 adopted on 25 May 2018, p.10.

[15] Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679 adopted on 25 May 2018, p.11.

Moreover, an adequate level of protection/appropriate safeguards still applies as the data subject can challenge the exchange of information before court in the Member State, with reference to the international agreement that forms the basis for the AEOI, and therefore continues to have enforceable rights and access to justice.

Finally, the question arises whether the commitment that EU Member States have entered into under CRS in combination with an overly extensive interpretation of the GDPR leads to an extraterritorial application of that GDPR. Especially as it concerns personal data of residents of third countries who have an account in an EU Member State, and if they also owe the data relating to that EU Member State account to their tax authorities themselves, it therefore concerns personal data that can also fall completely outside the scope of GDPR.

As a result of the aforementioned reasoning, article 49 (1) (d) GDPR is an additional legal basis for the transfer of personal data to third countries between public bodies, which is a very distinct difference with transfers of personal data involving private bodies. It is recommendable in order to delineate the divergence between transfers involving only public bodies and transfers also involving private bodies, that this disparity would be clearly established in the present Recommendation.

Best Regards,

The advisor general

The acting General Administrator of SES