



EDPB consultation on Article 48 of the GDPR – DOT Europe

DOT Europe welcomes the opportunity to comment on the European Data Protection Board's (EDPB) draft guidelines on Article 48 of the General Data Protection Regulation (GDPR). While we recognise the EDPB's commitment to ensuring the protection of personal data in the context of international data transfers, we respectfully submit that the draft guidance takes an overly conservative approach, particularly regarding data transfers to non-EU authorities for law enforcement purposes. Below, we outline our key concerns and recommendations.

Clarifying the scope of Article 48

Legality of non-EU requests

The draft guidance appears to imply that Article 48 of the GDPR categorically prohibits compliance with requests from non-EU authorities in the absence of an international agreement. We believe it is important to clarify that, while Article 48 addresses the enforceability and recognition of such requests within the EU it does not render them illegal per se. Non-EU authorities may lawfully make requests for data, and EU data controllers and processors should have clear, lawful pathways to respond to these requests where appropriate safeguards are in place.

We also highlight that EU member states themselves make numerous requests to US companies, as evidenced in the [Sirius report](#). This practice is expected to increase with the implementation of the e-Evidence Regulation. It is crucial that the final guidance acknowledges this reality and provides practical solutions for companies faced with such requests.

“Without prejudice” of other transfer grounds

While the EDPB guidelines acknowledge that Article 48's requirements are “without prejudice to other grounds for transfer” under Chapter V of the GDPR, they seem to restrict those other grounds to situations where there is either no international agreement or the agreement does not contain the appropriate safeguards (Paragraph 32). This interpretation contradicts the “without prejudice” provision in Article 48, which suggests organisations should be free to use other transfer grounds. This restrictive interpretation creates practical challenges, especially for organisations in the tech sector that field numerous data requests from various authorities.

Expecting organizations to review every relevant international agreement before considering other transfer mechanisms presents practical challenges and risks delaying data sharing, particularly in urgent situations where an Article 49 derogation may be the most suitable approach.

The EDPB should clarify that in line with Article 48, an international agreement is one option for transferring personal data to third-party authorities, and that other GDPR transfer mechanisms remain fully available.



Legal bases for processing data transfers under Article 48

Consent as a legal basis

The EDPB guidance states that consent will usually be considered an inappropriate legal basis for processing personal data in response to requests from non-EU authorities (Point 21). While we agree that consent would not be suitable in cases involving authoritative powers, we believe the EDPB's stance is overly restrictive.

We would encourage the EDPB to refer more closely to the legal test, in the guidelines, focusing on the importance of ensuring any consent relied upon is freely given, including in certain B2B contexts. We would also encourage the EDPB to clarify its assessment in paragraph 21 of the guidelines to provide examples of circumstances when consent might be appropriate.

Legitimate interest as a legal basis

Apart from exceptional circumstances, the draft guidance dismisses the use of legitimate interest under Article 6(1)(f) GDPR as a valid legal basis for responding to requests from non-EU authorities, the EDPB's 2019 assessment of the US Cloud Act. We respectfully disagree with this position as we consider it an unduly narrow interpretation that does not find support in the GDPR or CJEU jurisprudence.

the CJEU has consistently held that the assessment of whether a controller can rely on the legitimate interests legal basis depends on the "individual circumstances of a particular case".¹ Moreover, it has ruled that it is unlawful to categorically exclude reliance on legitimate interests for an entire "class" of processing operations.²

The EDPB's draft guidance selectively cites its 2019 initial legal assessment of the US Cloud Act. That assessment did not per se exclude the use of the legitimate interest balancing test as such. Still, it noted that in the absence of an international agreement, it was difficult to consider due process protections, data protection standards, and the right to an effective remedy. These concerns have been addressed by the European Commission's adequacy decision of 10 July 2023 on the [EU-US Data Privacy Framework](#) (DPF).

Furthermore, this position appears inconsistent with the EDPB's recent guidelines on legitimate interests, as referenced in paragraph 26 of the Article 48 guidelines. The language in those guidelines, reiterated in paragraph 26, underscores that the findings of the Cloud Act review were specific to the particular circumstances of that case. Accordingly, it seems inappropriate for the EDPB to assert in its Article 48 guidelines that legitimate interests may be relied upon only in 'exceptional circumstances.' A more suitable approach would be to reference the established legal test for the reliance on legitimate interests and, where necessary, direct readers to the EDPB's separate guidelines on this matter for further elaboration

¹ *Asociatia*, C-708/18, §53 ([here](#)) and *Breyer*, C-582/14, §62 ([here](#))

² *ASNEF and FECEMD*, C-468/10 ([here](#))



The final guidance should consider these developments and acknowledge that legitimate interest can be a valid legal basis, not necessarily limited to “exceptional” circumstances, especially for intra-company transfers.

Article 45 GDPR as a basis for data transfers

The draft guidance focuses heavily on Article 46(2) GDPR but notably omits references to Article 45 GDPR (*Transfers on the basis of an adequacy decision*), particularly in the context of the EU-US DPF adequacy decision. This omission is perplexing, given the relevance of the adequacy decision to data transfers between EU entities and their US counterparts.

For US-headquartered companies, requests from the US Department of Justice often target the US entity, regardless of where the data is physically stored. This scenario will also apply to EU companies with a US presence. In these cases, the relevant data flows occur between an EU entity and a US entity within the same company, making Article 45 GDPR directly applicable.

We are particularly concerned by the absence of any discussion of Article 45 GDPR in section 32 of the draft guidance. This section acknowledges that Article 48 GDPR’s requirement for an international agreement is without prejudice to other grounds for data transfers under Chapter V of the GDPR. However, the draft guidance only refers to Article 46(2) GDPR and ignores the possibility of relying on Article 45 GDPR.

We would encourage the EDPB to clarify more prominently the possibility for organisations to rely on Article 45 GDPR as a valid legal basis for data transfers in response to requests from non-EU authorities. This is important to enable organisations to leverage the significant work done by the European Commission and the EDPB itself, to assess the safeguards in place in the relevant jurisdictions, such as the recent EU-US DPF.

Conclusion

In conclusion, DOT Europe urges the EDPB to reconsider its approach to Article 48 GDPR and adopt a more balanced and pragmatic stance in its final guidance. Specifically, we recommend that the EDPB:

- Clarify that Article 48 GDPR addresses the enforceability of non-EU requests but does not make such requests illegal.
- Recognise that informed consent can be a valid legal basis for data transfers in specific B2B contexts.
- Reconsider its position on legitimate interest as a legal basis for responding to non-EU requests, taking into account the CJEU jurisprudence and the European Commission’s adequacy decision on the EU-US DPF.
- Include explicit references to Article 45 GDPR as a valid basis for data transfers, particularly in light of the EU-US DPF.



DOT Europe appreciates the EDPB's efforts to provide guidance on this complex issue and hopes that our comments will contribute to a more balanced and practical framework for addressing requests from non-EU authorities while maintaining robust data protection standards.