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To the European Data Protection Board

Vienna, 27 January 2025

Commentary Guidelines 02/2024 on Article 48 GDPR:

Introduction:

As an organisation dealing with GDPR issues we welcome the EDPB's efforts to provide guidance on the more cryptic Articles of the GDPR such as the one at hand.[1]

We also welcome the possibility to comment on the Guidelines, since it is our opinion that there are some things in the Guidelines that could be improved or clarified. Besides the general encouragement to add some specific examples, we consider that there are three things of note:

1. The scope of the Guideline,
2. The reference to C-252/21 in para 26, and
3. The nature of Article 48[2] in relation to other transfer mechanisms in Chapter V of the GDPR.

The Scope
The scope of the guideline has been narrowed down to situations where private entities are asked to disclose data in accordance with Article 48,[3] and broadened to also clarify how private entities should handle disclosure requests from authorities in third countries when Article 48 is not applicable.[4]

To avoid confusion regarding applicability of the guidelines we would recommend renaming the guidelines to better reflect the scope. The scope of the guideline being: how private entities should process disclosure requests of personal data based on a judgment of a court or tribunal and any decision of an administrative authority in a third country.

The Reference
Paragraph 26 of the guideline makes a reference to Case C-252/21 para 124 and 132 which read as follows (emphasis added):

124"Fourth, as regards the objective referred to by the referring court, ***relating to the sharing of information*** *with law-enforcement agencies in order to prevent, detect and prosecute criminal offences,* ***it must be held that that objective is not capable, in principle, of constituting a legitimate interest pursued by the controller, within the meaning of point (f) of the first subparagraph of Article 6(1) of the GDPR. A private operator such***

[1] Guidelines 02/2024 on Article 48 GDPR, adopted on 02 December 2024, version for public consultation (subsequently the "Guidelines").

[2] All references to Articles refer to Articles of the GDPR.

[3] Guideline para 6.

[4] Guideline para 20-26.

as Meta Platforms Ireland cannot rely on such a legitimate interest, which is unrelated to its economic and commercial activity. *Conversely, that objective may justify processing by such an operator where it is objectively necessary for compliance with a legal obligation to which that operator is subject."*

132 "In particular, given the observations made in paragraph 124 above, it will be for the referring court, inter alia, to inquire, for the purposes of applying point (c) of the first subparagraph of Article 6(1) of the GDPR, whether Meta ***Platforms Ireland is under a legal obligation to collect and store personal data in a preventive manner*** *in order to be able to respond to any request from a national authority seeking to obtain certain data relating to its users."*

It is noted that paragraph 124 of the ruling clearly states that prevention, detection and prosecution of criminal offences are not purposes that can be pursued by Meta under 6(1)(f), in principle, as they are not related to Metas "economic and commercial activity".

It is our reading of paragraph 132 in conjunction with paragraph 124 that the storing of personal data in a preventative manner to aid law enforcement could be necessary if there is a legal obligation to do so, but that neither the preventative storing nor the subsequent sharing of personal data can constitute a legitimate interest of the controller unless directly related to that controllers economic and commercial activity.

If the controller is not a for profit organization, it would absolutely be possible for economic and commercial activity to be substituted with whatever goal or activity the organization has.

We would kindly request that the reference made to Case C-252/21 be made to accurately reflect the position of the CJEU. For this reason, we would like a clarification in paragraph 25 and 26 of the guideline stating that transfers from a controller to a third countries authority can only be based on article 6(1)(f) if the transfer has a direct relationship with the activity, economic or otherwise, of the controller.

The nature of Article 48

The wording of Article 48 is as follows (emphasis added):

"Any judgment of a court or tribunal and 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****, such as a mutual legal assistance treaty, 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."*

The highlights in bold are made to clarify what we read as the nature of the Article. According to paragraph 29 of the Guidelines Article 48 is not a ground for transfer. We would like to question this assessment.

Article 48 makes a clear reference to "other grounds for transfer", meaning in essence that Article 48 is a ground for transfer.

We would also like to point out that international agreements between countries seem to be a different beast than binding enforceable instruments between authorities and bodies. As can be read from recital 108, Article 46(2)(a) seems to cover situations relating to administrative agreements between public authorities. Article 48 on the other hand seems to be a remedy for situations described in recital 115. By having an international treaty regulating extraterritorial scope of a public authority's power, transferring data to such an authority in accordance with the treaty would not be in breach of international law. The data processing operation conducted by the exporting controller would likely be a legal obligation under such a treaty.

This is not to say that Chapter 5 of the GDPR is not applicable. However, given the nature of the different provisions of Chapter 5, Article 45, 46, 47 and 49 as transfer mechanisms are to applied as alternatives to Article 48, just as they are applied as alternatives to one another.

If Article 48 does not detail a specific situation where transfers to third countries is allowed, but rather refers to the situation described in Article 46(2)(a), it would seem inconsistent with the rest of the wording of Article 46(2) GDPR where all of the other letters refer to specific Articles in the GDPR. Why is 48 left from the list of references if it does not prevail as an independent transfer mechanism? And what if any is even the purpose of Article 48 if Article 46(2)(a) already provides for transfers covered by Article 48?

We believe that the distinct wording in Article 48 denotes is as an independent transfer mechanism, and that the lack of reference to Article 48 in Article 46(2)(a) reinforces this conclusion.

Given the rather unique nature of transfers that can utilize Article 48 as a transfer mechanism, we would kindly ask the EDPB to provide examples when private entities would be bound by a bilateral or multilateral treaty between a third country and the EU or member state.

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