Public consultation on: Guidelines 02/2024 on Article 48 GDPR

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*(*The comments below represent exclusively the personal point of view of the author)*

The Guidelines indicate that in the context of Article 48 GDPR the main way to transfer data is when the 4 questions representing the 4 practical steps in the annex have positive answers.

Thus: 1) the request is based on a judgement or decision from a court or tribunal or an administrative authority of a third country, 2) the judgement or decision is based on an applicable international agreement (such as a MLAT), 3) the international agreement provides for a legal basis under Article 6 (1) (c) or Article 6 (1) (e) GDPR for the transfer of data, 4) the international agreement contains the appropriate safeguards in accordance with Article 46 (2) (a) GDPR and the EDPB Guidelines 2/2020 and all the compliance with the other relevant provisions of the GDPR is ensured.

This scheme is very useful in order to carry out the interpretation of the Article 48; at the same time, it would be significantly useful in practice to have legal references about which are in reality the international treaties (at least those signed by EU and/or EU Member States with third countries) in force at the moment satisfying all the 4 steps.

For example, attaching also a list of existing official international treaties at the Guidelines in question will help easily to find the existence of such treaties and consequently to assess the scenarios occurring for the interest of all parties and data subjects mainly.

Probably, there is not a large number of international treaties satisfying all the 4 steps in the annex. Thus, in practice, the main way to transfer data in accordance with the positive answers to the 4 steps cannot be realized in the majority of scenarios eventually occurring.

Consequently, the residual general rules for transfers (the two-step test) represent in reality the main way of assess the majority of the scenarios. Therefore, the legitimate interest (and so the preventive execution of a specific LIA in accordance with the specific case/scenario) will play a fundamental role in order to understand whether or not to "self-justify" a legal basis for a transfer.

Not only the LIA but also a TIA (transfer impact assessment) will play a decisive role for the specific case to assess with all the evaluation to carry out in relation to the matter of international transfers as provided by the GDPR and the eventual measures to adopt in advance for the specific case.

The problem is that - as also already stated by the EDPB and reported inside the Guidelines - the use of the legitimate interest as legal basis is very restrictive in this context and

so the transfer is not so easy to justify regardless the fact that there is an official order (also based on international treaty not satisfying all the 4 steps) plus the possible applications of sanctions for not disclosing (transfer) data to the third country.

In addition, there could be also scenarios where actually a multinational entity holding based in a third a country has subsidiaries worldwide and also in Europe.

In these scenarios, it could be possible that the third country to which the holding belongs has officially stipulated an international treaty with another third country; so, the holding in accordance with that international treaty in force might be asked to disclose data belonging to the whole group (thus, also the data of the subsidiary in Europe; even more interesting if, in this scenario, the subsidiary in Europe is a joint-controller with the parent company based in the third country and the Law of the third country has unilateral extraterritorial effects and application on it).

In this context, thus, it would be very interesting to assess all the potential way of interpretations and to understand the possible steps to carry out in order to assess the case.

In conclusion, the matter is very interesting and at the same time complicated due to the intrinsic international nature of it and the inevitable complexity of the interplay of different legal systems and also, in practice, the inevitable opposite

severe consequences mostly for the big multinational groups (in both scenarios: by disclosing/transferring data and so potentially facing fines due to an eventual breach of the GDPR or by not disclosing/transferring data but potentially be fined due to other kinds of breaches outside the GDPR).

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