

Academic comments on 01/2020 EDPB Recommendations

Pécs (Hungary), 21 December 2020

We would like to submit the following observations to the content of 01/2020 EDPB Recommendations on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data (hereinafter: Recommendations):

According to the Recommendations

“In the absence of an adequacy decision, you need to rely on one of the transfer tools listed under Articles 46 GDPR for transfers that are regular and repetitive. Only in some cases of *occasional and non-repetitive* transfers you may be able to rely on one of the derogations provided for in Article 49 GDPR, if you meet the conditions.”¹ [Highlighted by us]

and

“Article 49 GDPR has an exceptional nature. The derogations it contains must be interpreted restrictively and mainly relate to processing activities that are occasional and non-repetitive.”²

This interpretation has been further elaborated on by the Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679 from the EDPB, which states that according to recital 111 the legal bases for transfer should be divided into two distinct groups: one for occasional transfer only [Article 49 (1) subpar. 1 (b), (c) and (e) of the GDPR] and one not subjected to such limitations [Article 49 (1) subpar. 1 (a), (d), (f) and (g) of the GDPR]. Nevertheless, the Guidelines assert that Article 49 derogations should be used restrictively.³

In light of this, the suggested text of the Recommendation is misleading, since the occasional and non-repetitive requirement is not present for each legal basis in Article 49, such as explicit consent for example.

Although the Guidelines pay attention to the fact that Article 49 is exceptional in nature, one should not forget that the GDPR should not be interpreted in a way hindering normal economic activities.

Recently the Court of Justice of the European has declared the Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Privacy Shield to be invalid.⁴ This judgment has created a relatively new situation for almost every business

¹ 01/2020 EDPB Recommendations on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data p. 2.

² 01/2020 EDPB Recommendations on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data p. 11. para. 25.

³ 02/2018 EDPB Guidelines on derogations of Article 49 under Regulation 2016/679. p. 4-5.

⁴ C-311/18 - Facebook Ireland and Schrems ECLI:EU:C:2020:559 Ruling para 5.

entity in Europe that have overseas business connections. Data controllers can no longer rely on the Privacy Shield for data transfers to the United States. For larger companies there are a number of options for securing the legal transfer of personal data to the United States, such as Article 47 of the GDPR.

However these options are unrealistic for small companies using cloud services, and e-mail services provided from the United States (such as Gmail from Google and iCloud from Apple). Practically the only way to secure the legal transfer of personal data to the United States, which is a prerequisite for using such services in the first place, is to obtain explicit consent from the data subjects. The data controller, on condition it provides the data subjects with the necessary information required by the GDPR, should not be limited to occasional data transfers.

We believe therefore that not all grounds for data transfer are subject to the limitation of occasionality. The contrary reading would create an unnecessary burden on small EU businesses compared to other parts of the world causing a significant economic disadvantage for European enterprises.

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