




EUROPEAN DATA
PROTECTION SUPERVISOR



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European Data Protection Supervisor





The transfer of personal data to third countries and international organisations by EU institutions and bodies

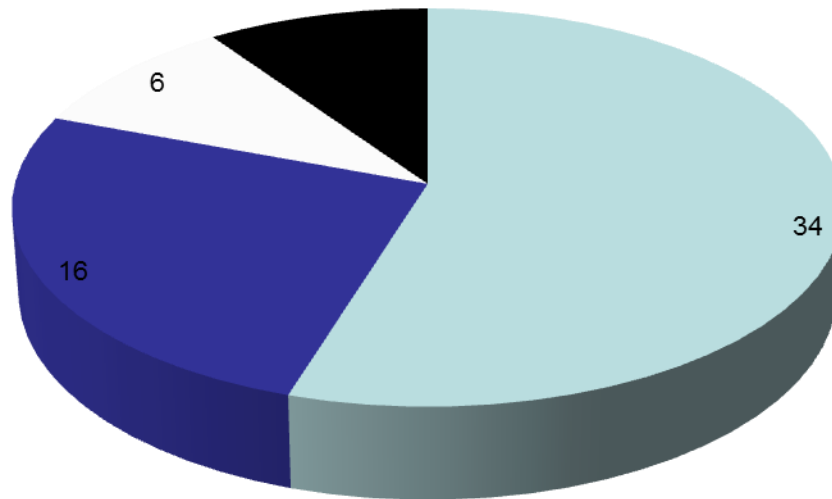
Workshop organised by the EDPS for DPOs

22 November 2013

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2013 survey. Question on transfers



- No / So far no
- Single cases (e.g. missions, procurement)
- Yes (in relation to core business or structural)
- No answer / not replied / voluntary and no answer



Structure of the presentation

- Introduction
- Preliminary issue: the notion of transfers
- Scope of Article 9
- Adequate protection (Article 9.1 and 9.2)
- Derogations (Article 9.6)
- Adequate safeguards (Article 9.7)
- Legislation and bilateral agreements
- Supervision and enforcement



Introduction

- EU i&b increasingly need to transfer p.d. to third countries and/or international organisations:

Cross-border cooperation & Transnational services

- Article 9: principle of “**adequate level of protection**”
Meaningfull data exchanges + ad hoc mechanisms + exceptions
- **The reform**



Preliminary issue: the notion of transfer

- No legal definition
- Natural meaning: data move or are allowed to move between different users
- Case-law: Lindqvist (C-101/01, 6 November 2003): uploading personal data onto an Internet page which is stored by a hosting provider: not a transfer
- Context of the case: very limited scope, state of development of the internet. Conclusion of the Court not to be applied to cases with other characteristics



Preliminary issue: the notion of transfer

- The term would normally imply at least the following elements:
 - the communication of personal data which is actively made available to the recipient(s),
 - with the sender's knowledge or intention that the recipient(s) will have access to it.
- Concept includes: "**deliberate transfers**" and "**permitted access**" to data by recipient(s).



Scope of Article 9

- Transfers of personal data to recipients which are **not subject to the Directive**. It does not cover recipients established in European Economic Area (EEA) countries unless the transfers occur in fields excluded by the Directive (former second and third pillar of EU law= presumption of adequacy, Convention 108 applicable).
- Articles 7 and 8. Case of EU delegations
- Europol and Eurojust



Respect for other legal conditions

- Respect of Chapter II of the Regulations:
 - (a) the processing activity prior to the transfer must be **lawful** (collection, storage, etc.); and
 - (b) the transfer itself must also be lawful (it must have a proper legal basis and be **consistent with the original purpose** of the processing).



Register of transfers as best practice

- Creation of an internal registration system of Article 9 transfers.
- This should not only include transfers based on adequacy but also – and **more importantly** - transfers based on derogations .



Adequate protection (Article 9.1 and 9.2)

- Additional condition: the transfer should take place *"solely to allow tasks covered by the competence of the controller"*.
- The level of protection afforded by a third country or international organisation shall be assessed in the light of *"all circumstances surrounding a data transfer operation or set of data transfer operations"*.



Notion of “adequacy” (WP29)

- Substance

- The purpose limitation principle -
- The data quality and proportionality principle –
- The transparency principle -
- The security principle
- The rights of access, rectification and opposition -
- Restrictions on onward transfers

- Supervision and Enforcement

- To deliver a good level of compliance with the rules
- To provide support and help to individual data subjects in the exercise of their rights.
- To provide appropriate redress to the injured party where rules are not complied with.



Assessment of adequacy

- Adequacy Decision adopted by the European Commission: **binding** on all MS and EU i&b

Andorra, Argentina, Canada (private sector), Switzerland, Faeroe Islands, Guernsey, State of Israel, Isle of Man, Jersey, New Zealand, US Safe Harbour (certain activities within the private sector) and Uruguay.

- Adequacy assessed by the controller: the controller should conduct a **specific** adequacy assessment of the data protection system of the recipient.



The Safe Harbour Agreement

- 7 data protection principles
- 15 FAQs which give further guidance
- The US data recipient commits himself to respect the 7 data protection principles
- Breach of such representation must be actionable under Section 5 FTC Act
- Safe Harbour applies only to data recipients that are subject to jurisdiction of FTC or US Dep. of Transportation (not applicable to banking and insurance sector)



Role of the EDPS in the assessment of adequacy

- Adequacy Decision adopted by the European Commission:
 - **no specific procedure**
- Adequacy assessed by the controller:
 - **analysis clearly documented** by controller and made available to EDPS upon request. **Consultation** to be submitted **in case of** (a) novelty, or (b) a clear impact on data subject's rights.



Derogations (Article 9.6)

- Unambiguous consent
- Necessary for the performance of a contract between d.s. and controller
- Necessary for the conclusion of a contract in the interest of the d.s.
- Necessary or legally required on important public interest grounds
- Necessary to protect vital interests of the d.s.
- If the transfer is made from a register which is intended to provide information to the public



Adequate safeguards (AS) (Article 9.7)

- Data protection guarantees which are created *ad hoc*, and which do not already exist in the recipient's legal system. The purpose of these instruments is to create the protection that is lacking in the data's destination.
- Typical examples of adequate safeguards are the Standard Contractual Clauses (SCC) adopted by the Commission, or Binding Corporate Rules (BCR).



SCC	2001/497 (C2C)	2002/16 (C2P)	2004/95 business C
Third party beneficiary clause	X	X	X (no representation by assoc.)
Obligations of the data exporter	X	X	X
Obligations of the data importer	X	X	X (no copy to d.s.) more flexible auditing requirements (reasonable)
Liability	Joint & several	data exporter	due diligence by the data exporter;
Mediation & jurisdiction	Mediation or court (dec. of the d. exp.)	Mediation or court (dec. of the d. exp.)	Arb., med., Court of establ. d. exp.
Governing law	Country where exp. is establ.	Country where exp. is establ.	Country where exp. is establ.
Cooperation with supervisory authorities	Audit by DPA of d. importer, abide by the advise of the DPA	Audit by DPA of d. importer, abide by the advise of the DPA	Compliance with final decision
Mandatory data protection principles	X	X	X (no access if abusive)
Member States' power to block or suspend transfers	X	X	X, larger



Other cases of AS: content requirements (not exhaustive)

- direct verification by authorities (e.g. joint inspections, audits by independent bodies, etc.);
- the obligation to designate an independent data protection officer;
- independent investigation of complaints (designation of contact points for enquiries);
- dissuasive sanctions, appropriate redress and compliance with Court decisions;
- an accountability clause (obligation to provide evidence of compliance to the EDPS, either upon request or at regular intervals);
- transparency of the safeguards (eg publication of the instruments on the internet);
- termination of the agreement, arrangement, etc. in case of breach.
- Reference to EDPS powers to suspend or prohibit flows in case of breach or likelihood of breach



Form and nature of the instrument reflecting the AS

- Field of private law: SCC, *ad hoc* contract, etc.
- Field of public law: international agreement, MoU, etc.



Role of the EDPS in dealing with derogations

- Article 9.6 derogations:
 - Controller not required to inform the EDPS *ex ante*, but upon request. Consultation if necessary,
- Article 9.7 derogations (AS):
 - No need for prior authorisation or consultation: where Standard Contractual Clauses (SCC) are used.
 - No need for prior authorisation, but consultation might be necessary: when an *ad hoc* binding instrument (as opposed to SCC), is developed by the EU institution or body to be used in either private or public law field.
 - Need for prior authorisation: In exceptional cases where the transfers are based on safeguards developed *ad hoc* and are not incorporated in a legally binding instrument



Special situation: legislation and bilateral agreements

- EU institutions and/or bodies might be required by EU legislation or bilateral agreements to conduct international transfers, as controllers. The instrument should include the appropriate framework for compliance with Article 9.
- The legislation or bilateral agreement in question might already be in force and not comply with Article 9. Controller should adopt complementary measures to ensure compliance with Article 9 before the transfer or set of transfers take place.
- EDPS should be consulted under Article 28(2)



Supervision and enforcement

- Supervision tools:
 - Prior checks
 - Consultations, complaints handling, inspections
- Enforcement tools:
 - Powers as described in Article 47



"I THINK YOU'LL FIND OUR SAFEGUARDS
FOR PROTECTING YOUR PERSONAL
INFORMATION MORE THAN ADEQUATE!"



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