

Track Changes

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INTERNATIONAL DATA TRANSFERS: EDPB'S FINAL RECOMMENDATIONS ON 'SUPPLEMENTARY MEASURES'

On 18 June 2021, the European Data Protection Board (**EDPB**) adopted its final version on 'supplementary measures' for data transfers to third countries (available [here](#)). The initial version from November 2020 received wide attention but left questions for the future of data transfers to third countries such as the U.S. (see our [client alert](#)).

Summary: The new guidelines favour a risk-based approach allowing for a more in-depth review of each type of data transfer. In addition to local laws in the third countries, data exporters must also consider local practices. Such analysis may also indicate that certain "problematic" laws are not applied in practice and thus favour a data transfer.

THE GUIDELINES IN THE CONTEXT OF INTERNATIONAL DATA TRANSFERS

The guidelines are a direct result of last year's judgment C-311/18 (Schrems II) of the Court of Justice of the European Union (**CJEU**). Based on the court's assessment of the legal framework in the U.S., it invalidated the EU-US-Privacy-Shield and required the implementation of additional safeguards when using standard contractual clauses (**SCCs**) or binding corporate rules (**BCRs**).

However, the court did not further describe which 'additional measures' may provide an adequate level of protection. Rather, it only specified certain criteria which must be met whenever personal data subject to the GDPR should be transferred to a third country (e.g. restriction of government surveillance as necessary and proportionate in a democratic society and while providing effective legal remedies for data subjects).

EMPHASIS OF THE NEW GUIDELINES

The new and revised guidelines aim to provide examples of when and how supplementary measures may be implemented to mitigate potential risks to data subjects. The updated version features more background information on certain measures, such as strong encryption, and an additional focus on the practices of the third country. Furthermore, the mentioned sources of information to assess a third country have almost increased threefold (see Annex 3 of the guidelines).

Supplementary measures for SCCs must be assessed on a case-by-case basis for the respective type of data transfers. When reviewing applicable legislation and practices, the parties should therefore only consider information specific to the type of transfer that is widely accessible, reliable, verifiable and objective based on empirical evidence. This information and the internal assessment procedure must be documented in an assessment report (see marg. no. 54, commonly referred to as "Transfer Impact Assessments" or "TIAs").

Notably, the parties may also consider the documented practical experience of the data importer regarding past access requests by authorities, i.e. information of e.g. cloud service providers on recent governmental access requests. If the parties have no reason to believe that relevant and problematic legislation will be applied in practice, the transfer may, in certain cases, proceed without supplementary measures (see recital 43.3 of the guidelines).

This more specific approach allows the parties to consider whether the intended transfer will in practice be subject to inadequate surveillance measures. For example, where surveillance laws are only applicable to electronic service providers, they may not directly apply to a sales or HR department in such third country. However, where this department stores data with a cloud service provider in the same or a different third country, surveillance laws may again apply. The parties must therefore consider the whole processing chain.

Additionally, the EDPB mentions that it will update the guidelines for BCRs (WP256/257). Groups currently using BCRs will therefore need to review and possibly amend their BCRs with supplementary measures.

KEY TAKE-AWAYS

The change in tone of the guidelines strengthens the arguments of controllers who reasonably assume that their data will not be subject to foreign government surveillance. In addition, controllers may more broadly rely on Art 49 exceptions for certain types of transfers rather than only for individual, occasional and non-repetitive transfers.

With the recently updated standard contractual clauses (see our [client alert](#)), the supplementary measures will also be relevant for EU data processors acting as data exporters when using the new processor to processor SCCs.

Recommended steps before exporting data to third countries based on SCCs or BCRs:

- Map data transfers and identify your data transfer mechanisms (e.g. SCCs)
- Review the local legislation *and* local practices by authorities in each country of the processing chain (including onward transfers to sub-processors)
- Implement appropriate technical and organisational measures, and where necessary, review whether these measures adequately mitigate problematic legislation
- Document your review, your information sources and your conclusion for *each* type of transfer (e.g. different legislation may apply for IT service providers or health care providers in the third country)
- Inform data subjects of data transfers to third countries including a reference to the appropriate or suitable safeguards and where to obtain a copy thereof
- Schedule regular review and audit cycles

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For more information about our services, please contact:



Roland Marko
Partner
roland.marko@wolftheiss.com
T: +43 1 51510 5880



Paulina Pomorski
Senior Associate
paulina.pomorski@wolftheiss.com
T: +43 1 51510 5091



Johannes Sekanina
Associate
johannes.sekanina@wolftheiss.com
T: +43 1 51510 5881



Pascal Gstöttner
Associate
pascal.gstoettner@wolftheiss.com
T: +43 1 51510 5882

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Wolf Theiss
Schubertring 6
AT – 1010 Vienna

www.wolftheiss.com