Transfers of personal data upon foreign authorities' requests – the EDPB's guidelines

Charlotte Beck, le 26 février 2025

The EDPB has published guidelines on art. 48 GDPR, often used in the context of transfers of personal data to foreign authorities. The guidelines aim at clarifying the conditions for such a transfer to be lawful.

EDPB Guidelines 02/2024 on Article 48 GDPR, adopted 02 December 2024 (in consultation until 27 February 2025)

Last December, the EDPB published guidelines on art. 48 GDPR, with the purpose of clarifying the rationale and objectives of the article, as well as its interactions with the remainder of Chapter V of the GDPR.

The fifth chapter of the GDPR regards the transfer of data outside of the European Economic Area. The principle is that all transfers abroad shall only take place when one of the grounds of Chapter V is fulfilled, mainly meaning those provided in either art. 45, art. 46 or art. 49 GDPR.

The subject of the EDPB's guidelines analysed in this contribution, art. 48 GDPR, is not a ground for processing as the other articles of that chapter. It is a clarification of the requirements when basing the transfer on a decision or judgment from a third country's public body. Such a transfer is only possible if an international agreement is in force between the respective actor's countries. The international agreement may be a mutual legal assistance treaty (MLAT).

The scope of the guidelines is limited to the transfer of data from a private entity in the EU, based on a request from a third country's public authority. The article itself is not restricted to the transfer of private entities – it may also cover public entities –, but the EDPB considers the former as the most widespread scenario. Such a request would be, for example, made to entities in the banking sector by foreign tax authorities or law enforcement.

In the instance a foreign public body requests from a private EU entity to transfer personal data, the GDPR is applicable, as provided by art. 3 par. 1 GDPR on the territorial scope of the

Regulation. In addition to the GDPR, specific rules of Member States may apply, such as criminal procedural rules.

When transferring personal data abroad, the two-step test must be performed. The first is the identification of a legal basis for the processing – i.e the transfer –, on the principle set out in art. 5 par. 1 GDPR and found in art. 6 GDPR. The second step is the compliance with Chapter V, meaning that there is a ground for the transfer.

A legal basis

For the first step, the most appropriate legal basis, as outlines by the EDPB, would be the "legal obligation" provided by art. 6 par. 1 let © GDPR, in conjunction with art. 6 par. 3 GDPR. Indeed, if an international agreement is in place, it is part of the country's legal systems and is therefore binding to the parties, as a "legal obligation". Other legal bases may however be relied on. The EDPB analyses and provides guidance on each.

Consent is difficult to argue, especially in the exercise of an authority's power. The requirement that consent must be "free" can be put in question. It is reminded – as described in Recital 115 – that the aim of the GDPR is also to protect individuals against the extraterritorial application of laws that may be in breach of international law.

Contracts are excluded, by nature.

Vital interest of the data subject or other persons : the former requires that conditions of international laws are met (e.g. Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction), the latter that no other legal basis can manifestly be used.

Public interest is the most appropriate legal basis besides the legal obligation. It must however have a basis in the Union's or the member state's laws.

Legitimate interest may be used in exceptional circumstances and always with the performance of the necessity and balance test. All the potential and/or actual consequences for the data subject must be taken into account. Here, the EDPB provides examples, such as :

> "the seriousness of alleged offenses that may be notified, the scope of the request, applicable standards and procedural guarantees in the third country, and applicable data

> protection safeguards."

The nature of personal data and type of processing activity are also to be taken into account. Finally, and most interestingly, the reasonable expectation of the data subjects should be considered. In that case, the processing must be limited to what is "demonstrably necessary to pursue the specific interest".

It is clarified here that relying on the legitimate interest does not allow to rely on that legal basis in order to pre-emptively collect and store data "just in case" it might be requested by an authority. In the past, the CJEU has ruled that the interest of the data subject overrides the controller's interests (on that topic, see : www.swissprivacy.law/244/).

A ground in compliance with Chapter V

The relevant ground linked to art. 48 GDPR is of course art. 46 par. 2 (a) GDPR, which provides that an appropriate safeguard can be :

> "a legally biding and enforceable instrument between public authorities or bodies"

International agreements, such as MLAT, provide for the cooperation between authorities of different countries, and may also concern cooperations by private entities.

The minimum safeguards that need to be included in said international agreements are similar to the "adequacy" conditions of art. 45 GDPR. An equivalent level of protection must be ensured, meaning that the core principles of data protection need to be guaranteed. This means that, in particular, data subject rights must be effective and enforceable, that restrictions on onward transfers are determined, additional protections for sensitive data are in place, etc.

In the absence of these minimum safeguards in the international agreement or a separate binding instrument, the controller or processor must rely on a different ground of Chapter V. If no adequacy or appropriate standards can be relied upon, the exceptions of art. 49 GDPR may be used as a last recourse, while remembering that these derogations should be interpreted restrictively and used only for occasional cases (see the EDPB Guidelines 2/2018).

The main takeaways of the guidelines are that a judgment or decision from a third country

cannot automatically be used as a ground for transfer. Indeed, a binding international agreement between the two stakeholder's countries is needed. If applicable, the international agreement can be a legal basis and a ground for transfer.

This guidance from the EDPB clarifies the reach of art. 48 GDPR, and by extent, other articles of Chapter V. It should be reminded here, as does the EDPB, that the question regarding the need for an international agreement for the recognition and enforcement of a decision or judgment is different from the question of the lawfulness of a personal data transfer.

The requirement for minimum safeguards to be present in the international agreement restricts the capacity to rely on any international agreement between two countries. This mechanism can however be used as replacement for an adequacy decision and provide a similar framework between a Member State and a third country. The process of giving out adequacy decision is quite lengthy and generally only initiated towards countries with a broad economic interest for the European Union as a whole. Relying on a binding instrument provides Member States with the ability to enter into specific MLAT with certain third countries, while ensuring data protection aspects are covered.

In Switzerland, a similar ground for transfer is provided at art. 16 par. 2 let. a FADP. The Message for the law's revision (FF 2017 6658) states that, are considered as "international treaty" conventions such as the Convention 108 and its amending Protocol. Art. 67 let. a FADP explicitly authorises the Federal Council to conclude international treaties with third country authorities in charge of personal data protection.

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