



Swedish Police Authority
Legal Affairs Department

The Swedish National Police's comments on the draft of Guidelines on Article 37 Law Enforcement Directive

While the Swedish Police Authority (hereinafter SPA) welcomes the guidelines and appreciates EDPB's effort to provide guidance on the application of Article 37 LED, the SPA regrets that the EDPB did not answer the Council's call to take into account the practical needs and conditions for data transfers to third countries/international organisations in the field of judicial and police cooperation. The guidelines, in their current condition and when interpreted and applied by national supervisory authorities, could constitute a serious threat to effective judicial cooperation in criminal matters and police cooperation between EU Member States and third countries/international organisations.

In the absence of adequacy decisions issued by the Commission the SPA shares the EDPB's view on legally binding instruments (negotiated by Governmental bodies), as the preferred option for the transfer of personal data to third countries/international organisations. Instruments which meet the requirements laid down by the EDPB in section 3 however are likely to be few. One could also argue that it is poor resource management for every EU Member State to negotiate bilateral agreements with 100+ third countries/international organisations. Irrespectively, the unfortunate consequence is that national competent authorities at the operational level today are forced to devote a lot of time and resources to attempt to evaluate third countries' data protection legislation etcetera. The level of control and requirements imposed on national competent authorities as described in section 4.2 of the guidelines are in this context both unreasonable and unrealistic.

The guidelines (paragraph 83) states that *the ratification of such instruments (multilateral or bilateral international instruments and frameworks) may not themselves provide for essentially equivalent level of protection but would still be relevant to the assessment of existing safeguards and the level of protection under Article 37(1)(b), in particular depending on their*

implementation (e.g. ratification of Convention 108 and additional protocols). In paragraph 31 it is stated that a legally binding instrument may assume a bilateral or multilateral form, i.e. an agreement or a convention, between a Member State and a third country or third countries or an international organisation. According to the Swedish legislator the Convention 108 is a legally binding instrument. It is not fully clarified but the EDPB appears to consider the Convention 108 and additional protocols not to be a legally binding instrument. The SPA questions on what grounds the EDPB disqualifies the Convention 108 as a legally binding instrument. The SPA call on the EDPB to clarify its position on the status of the Convention 108 as well as on other relevant data protection frameworks (e.g. INTERPOL'S Rules on the Processing of Data). The SPA also invite the EDPB to account for the potential deficiencies of each of the international data protection instruments and frameworks to provide guidance for competent authorities when considering asking for additional safeguards.

The guidelines are perceived as theoretical and very focused on the details of every requirement for transfers to be considered compliant. While that of course is instructive the SPA finds that it would have been more beneficial if the EDPB would have taken a less theoretical and more practical approach on how to apply Article 37 LED, and Article 37(1)(b) LED in particular. The EDPB could for instance have elaborated further on how competent authorities in reality can assess that the legislation and practices of a third country provides a level of protection essentially equivalent to that guaranteed under the LED, or how to ensure that appropriate safeguards indeed are applied in practice in a certain third country. It would also be useful if the guidelines would elaborate on potential criteria or common grounds for “specific categories or sets of transfers” and examples on what could be considered categories or sets of transfers

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