

OBSERVATION

The third criterion “requires that the importer is geographically in a third country or is an international organisation, but regardless of whether the processing at hand falls under the scope of the GDPR”. It seems quite clearly to contrast:

a) in particular, with point 7 of preamble of Commission Implementing Decision (EU) 2021/914 of 4 June 2021 (on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation EU 2016/679 of the European Parliament and of the Council) in which it's written that “a controller or processor may use the standard contractual clauses set out in the Annex to this Decision to provide appropriate safeguards within the meaning of Article 46(1) of Regulation (EU) 2016/679 for the transfer of personal data to a processor or controller established in a third country, without prejudice to the interpretation of the notion of international transfer in Regulation (EU) 2016/679. The standard contractual clauses may be used for such transfers only to the extent that the processing by the importer does not fall within the scope of Regulation (EU) 2016/679. This also includes the transfer of personal data by a controller or processor not established in the Union, to the extent that the processing is subject to Regulation (EU) 2016/679 (pursuant to Article 3(2) thereof), because it relates to the offering of goods or services to data subjects in the Union or the monitoring of their behaviour as far as it takes place within the Union”;

b) in general, with the concept wanted and enforced by the whole Chapter V of Regulation EU 2016/679 whose purpose is to ensure that the level of protection of natural persons guaranteed by above mentioned Regulation is not undermined where personal data is transferred to third countries. Such risk of undermining wouldn't be run even if the processing of personal data by the data importer established in a third country were under the scope of Regulation (EU) 2016/679 in accordance with its article 3.2.

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