IATA Response to the EPDB Consultation on Recommendation 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data (10 November 2020) ("Transfer Guidance") and Recommendation 02/2020 on the European Essential Guarantees for surveillance measures (10 November 2020) ("EEG Guidance").

Executive summary

IATA, on behalf of its members, and through its dedicated Privacy Law Working Group, under the Legal Advisory Council, hereby present its comments on the Transfer Guidance and The EEG Guidance.

IATA welcomes that the European Data Protection Board ("EPDB") has published the Transfer Guidance and the EEG Guidance to address the important topic of international data transfers in light of recent CJEU decisions including the 'Schrems II' decision.

IATA draws the EDPB's attention on the essential role of international data transfers for international travel. These are not optional or discretionary data transfers and are essential to the performance of the contract that customers have entered into.

IATA's members are concerned that:

- the Guidance does not address the requirement for essential international data transfers in its approach to Chapter V of the GDPR such as those needed in the context of international travel;
- in assessing supplementary measures to be used when making data transfers under Article 46, the Guidance focuses on the use of technical measures which are of no relevance when the data importer requires access to the data to provide services to the customer/data subject in the third country;
- the Guidance does not reflect the approach of the GDPR and the CJEU to the use of Article 49 Derogations which is a matter of great concern given (a) the reduced practical benefit of adequacy decisions as those decisions are invalidated and (b) the prohibition of the use of Article 46 transfer tools, for third countries which do not have "essential equivalence";
- the Guidance recognises that privacy rights from Articles 7 and 8 of the Charter of Fundamental Rights are not absolute rights, and must be considered in relation to their function in society, but it fails to take into account in considering the above matters:
    - the fundamental rights of the passengers to freedom of movement (Article 45 of the Charter of Fundamental Rights and Article 2, Protocol 4, ECHR);
    - the role of travel in personal and family life (such as to allow friends and family to meet) which is itself a fundamental right under Articles 7 of the Charter of Fundamental Rights and Article 8 ECHR);
    - the fundamental rights of business to conduct their business (Article 16 Charter of Fundamental Rights) whether that be the airlines involved in the provision of such services or business which need to travel in order to conduct their business in third countries; and
    - the key role of international travel to third counties for a wide range of diplomatic, medical, humanitarian, cultural, business and tourism reasons.
- the assessment, monitoring, and notification to the relevant supervisory authority(ies) of any change in the third country legislation, with regard to data protection and privacy, will represent a substantive, complex and costly exercise for the airlines, and other businesses. It is proposed that the EC and/or the EDPB take a leading role to review and regularly assess the compliance of third countries and the availability of technical means to the authorities in those countries them that could defeat technical measures used by exporters (noting that such information would not be generally known to exporters). This will provide more global legal certainty and substantially decrease the compliance risk on the airlines, and other businesses.

IATA notes that the EDPB is conducting this consultation in parallel to the European Commission consultation on revised Standard Contractual Clauses (SCCs) which IATA has submitted comments to which are available

at the links in the footnote below.[1] IATA requests that the comments submitted to the Commission are also taken into consideration as a part of this response to the EDPB Guidance.

Consultation process

IATA notes that the parallel European Commission and EDPB consultations are inter-dependent and suggests there is a need for further period of consultation based on the revised proposals of the European Commission and EDPB to allow revised proposals to be considered alongside each other.

In addition, the EDPB has provided a limited period for a response despite the issues raised being complex, impacting business globally (given GDPR applies extra-territorially) and that they are being reviewed in the background of businesses responding to the unprecedented impact of Covid-19. Given the volume of comments anticipated to the consultation further engagement should occur with stakeholders across civil society prior to adopting any revised guidance.

Implementation period

IATA members are concerned that the EDPB Guidance states that the supplementary measures recommendations in the Transfer Guidance are immediately applicable. The new SCCs and the requirements are inextricably linked and will need to further develop in parallel in response to the consultations. As the guidance notes that the process is complex and being assessed against new and emerging requirements which will take time to fully implement.

The draft SCCs propose an implementation period of one year from the implementing decision (which IATA has commented on as requiring a two years period and that should also apply to any contract being renewed during that period).

The need for an extended implementation period is also needed to allow any technical changes adopted as part of supplementary measures to be put in place.

Data exporters should be supported by the EDPB in taking a reasonable prioritized approach to the process of conducting supplementary measures reviews and that should occur over the same time period those new SCCs are implemented.

Adequacy decisions under Article 45 GDPR

It is welcomed that the Transfer Guidance recognizes that adequacy decisions of the European Commission under Article 45 GDPR or the Directive can be relied upon without the need for further assessment by a data exporter "other than monitoring that the adequacy decision remains valid" (Transfer Guidance, para 19).

While that provides some legal certainty to data exporters, the Transfer Guidance highlights such decisions can and have been invalidated by the CJEU (but not by supervisory authorities) as with the Safe Harbor and Privacy Shield mechanisms which significantly undermines that legal certainty.

In addition, clarity about the scope of not being required to make such assessments when dealing with a third country with sector specific adequacy (for example Canada as regards commercial organisations only) would be welcomed.

At present adequacy decisions remains of limited scope as a transfer mechanism.[2]

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[1] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12741-Data-protection-standard-contractual-clauses-for-transferring-personal-data-to-non-EU-countries-implementing-act-/feedback?p_id=14543795
https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12740-Data-protection-standard-contractual-clauses-between-controllers-processors-located-in-the-EU-implementing-act-/feedback?p_id=14541882

[2] Currently Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland and Uruguay

IATA members would welcome the Commission and EDPB progressing adequacy decisions with a broader set of countries and sectors quickly and providing visibility of progress to all stakeholders.

As suggested below that process could be usefully conjoined with the process to provide for 'essential equivalence' when using Article 46 transfer tools with the law and practice of third countries being monitored by the Commission and the EDPB to assist with assessing the supplementary measures required.

Article 46 GDPR transfer tools including standard contractual clauses (SCCs)

The need for a risk-based approach to supplementary measures taking into account all relevant factors

In assessing the use of Article 45 transfer tools, data exporter and data importers IATA members suggest that data exporters and importers should be expressly permitted to take a risk-based approach to the supplementary measures required taking into account all relevant factors. That should for example take into account where personal data is in any event available to the public authorities in a third country without any involvement of the data exporter or data importer - for example in the travel industry where such data is required to be provided by passengers in advance of and/or on arrival into into the third country. Such a risk-based approach is consistent with the approach of the GDPR as evidenced by the role of privacy impact assessments and breach notification assessments. The approach is also supported by the draft SCCs published by the Commission, wherein parties are specifically to take into account the nature of the data to be transferred and practical experience, among other factors, when determining whether the laws of a third country prevent the data importer from fulfilling its obligations under the clauses

Moreover, in the context of international travel, where an individual voluntarily submits himself/herself to the laws of the country they are visiting, including the consequences of there not being an 'essentially equivalent' privacy regime (and perhaps no legal privacy regime at all), it would be a very odd outcome if the restrictions on their personal data being transferred are considered without regard to the fact that much of the same personal data may be shared by that individual through their normal day-to-day interactions in that country. To take a simple example, to apply the requirements of Chapter 5 of GDPR to restrict (say) the transfer of the name and address of a traveler when these same details are likely to be shared while the passenger is in the destination country (hotel, car hire, etc.) seems very strange. While their decision to visit a country with a lower standard of data protection should not deprive them of their EEA privacy rights altogether, nor should it be ignored when assessing the level of risk to their privacy of sending their personal data with them in connection with their booking.

The need to avoid a hierarchy of supplementary measures which does not recognize when technical measures cannot be applied

In identifying supplementary measures there should not be a hierarchy of those measures as between technical, contractual and organizational measures. In the context of international travel the use of some measures are inherently not practical to implement because the data importers require access to the data in the clear to provide a service to the data subject while in and travelling to/from a third country. For example, that necessarily precludes the data importer only having the data in an encrypted form (as referenced in use cases 1, 3, 6 and 7), pseudonymized form (use case 2) or the use of "split or multi party processing" (use case 5). In addition, those data importers would not be categorized as protected recipients (use case 4).

Relationship with the extra-territorial application of GDPR to be made clear in the Guidance

IATA members welcome the EC recognition that SCCs are not required for data transfers between a data exporter and data importer who are both subject to the GDPR. This recognizes the extra-territorial application of GDPR and should be reflected in the Transfer Guidance.

Derogations

IATA welcomes that the EDPB recognizes that the Article 49 derogations do not require data exporters to follow steps 3 to 6 when relying on an adequacy decision or an Article 49 derogation (para 27).

The derogations should be approached as "genuine derogations" as the Article 29 Working Party stated in WP 114 the following as regards Article 26 of the Directive (the equivalent to Article 49) of the GDPR):

> *"Conversely, Article 26(1) contains genuine derogations from the principle of adequate protection laid down in Article 25 of the Directive. In fact, these exceptions allow the transfer to take place to third countries that do not ensure an adequate level of protection. A fortiori, they could also be used as a legal basis where the country does ensure an adequate level of protection but where its adequacy has not been assessed. Although the use of the derogations per se does not imply in all cases that the country of destination does not ensure an adequate level of protection, it does not ensure that it does either. As a consequence, for an individual whose data have been transferred, even if he has consented to the transfer, this might imply a total lack of protection in the recipient country, at least in the sense of the provisions of Article 25 or 26(2) of directive 95/46. Considering this important difference in terms of protection, it is important that these various legal bases are implemented consistently with respect to the overall system of which they form part."*

The continuing validity of the above is reflected by the language of Article 49 which recognizes their availability in the absence of "*an adequacy decision and appropriate safeguards*" (Article 49) and was recognised by the CJEU in Schrems II where it stated:

> "*in view of Article 49 of the GDPR, the annulment of an adequacy decision such as the Privacy Shield Decision is not liable to create such a legal vacuum. That article details the conditions under which transfers of personal data to third countries may take place in the absence of an adequacy decision under Article 45(3) of the GDPR or appropriate safeguards under Article 46 of the GDPR*." (para 202)

However given the limited application of adequate decisions and the fact that Article 46 measures will potentially not be available for use as regards transfer to all third countries, IATA members are concerned that the Transfer Guidance seeks to narrow the scope of the use of the Article 49 derogations (based on EDPB Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679 ("Derogation Guidance")): Stating that the Article 49 derogations "*must be interpreted restrictively and mainly relate to processing activities that are occasional and non-repetitive*." (para 25).

IATA members are concerned that such restriction on the use of Article 49 does not reflect the approach of GDPR or the decision in the Schrems II decision.

It is recognized that that derogations should be construed strictly on the terms set out in Article 49 in line with the decision in 'Schrems I'[3] where the court stated that:

> *"Furthermore and above all, protection of the fundamental right to respect for private life at EU level requires derogations and limitations in relation to the protection of personal data to apply only in so far as is strictly necessary (judgment in Digital Rights Ireland and Others, C-293/12 and C-594/12, EU:C:2014:238, paragraph 52 and the case-law cited)." (para 92)*

Consistently with that requirement, the wording of Article 49 provides for specific derogations and that the requirement of necessity (in most but not all cases under Article 49).

However the wording of Article 49(1)(a) to (g) does not provide that transfers under those derogations be "*occasional and non-repetitive*". The EDPB has added those requirements based upon the EDPB Derogations Guidance which itself relies on the content of (1) recital Article 49 par. 1 §2 and (2) recital 111. It is suggested that such an inclusion is incorrect because:

(1) The terms of Article 49 par. 1 §2 are expressly a separate and further derogation to those in Articles 49(1)(a)-(g) as made clear by the underlined text*:*

[3] Available at:
http://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=18236591

*"*Where a transfer could not be based on a provision in Article 45 or 46, including the provisions on binding corporate rules, and none of the derogations for a specific situation referred to in the first subparagraph of this paragraph is applicable*"*

The reference in Article 49 par. 1 §2 to a requirement that the transfer is "*not repetitive*" should only be read to apply to the derogation under Article 49 par. 1 §2 (and not to Article 49(1)(a) to (g)).

(2) As the terms of Article 49(1)(a) to (g) are clear it is inconsistent with long established EU law principles to use recital 111 to change the express wording of Article 49(1)(a)-(g) as the CJEU has stated:

" the preamble to a Community act has no binding legal force and cannot be validly relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording" [4]

It is suggested that EDPB guidance is amended to reflect this by removing the statement that transfers under the specific derogations in Article 49(1)(a) to (g) must be limited to "*occasional and non-repetitive transfers"*.

The impact of the EDPB adding in those requirements to Article 49 are as follows:

- data subjects would still be able to send personal data directly to those third countries, but it would be inconvenient- for example it would mean they would not be able to book connecting flights;
- in relation to any countries which do not provide for "essential equivalence" as required by Article 45 and 46, such transfers could not occur under Article 49 unless they are occasional, which would act as an outright prohibition on such data transfers;
- such a prohibition would be inconsistent with the approach of Chapter V of the GDPR to data transfers and would that unreasonably interfere with:
    - the fundamental rights of the passengers to freedom of movement (Article 45 of the Charter of Fundamental Rights);
    - the role of travel in personal and family life (such as to allow friends and family to meet) which is itself a fundamental right under Articles 7 and 8 of the Charter Fundamental Rights
    - the fundamental rights of business to conduct their business (Article 16 Charter of Fundamental Rights) whether that be the airlines involved in the provision of such services or business which need to travel in order to conduct their business; and
    - the key role of international travel to third counties for a wide range of diplomatic, medical, humanitarian, cultural, business and tourism reasons.

[4] See C-134/08 Hauptzollamt Bremen, vs. J. E. Tyson Parketthandel GmbH hansej, para 16;