



**EDPS position paper on
The transfer of personal data to
third countries and
international organisations
by EU institutions and bodies**

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Introduction

- EU i&b increasingly need to transfer p.d. to third countries and/or international organisations:

Cross-border cooperation & Transnational services

- Article 9: principle of **“adequate level of protection”**
Meaningfull data exchanges + ad hoc mechanisms + exceptions



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Preliminary issue: the notion of transfer

- No legal definition
- Natural meaning: data move or are allowed to move between different users
- Case-law: Lindqvist (C-101/01, 6 November 2003): uploading personal data onto an Internet page which is stored by a hosting provider: not a transfer
- Context of the case: very limited scope, state of development of the internet. Conclusion of the Court not to be applied to cases with other characteristics



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Preliminary issue: the notion of transfer

- The term would normally imply at least the following elements:
 - the communication, disclosure or otherwise making available of personal data,
 - conducted with the knowledge or intention of a sender subject to the Regulation that the recipient(s) will have access to it.
- Concept includes: "**deliberate transfers**" and "**permitted access**" to data by recipient(s).



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Adequate protection (Article 9.1 and 9.2)

- Additional condition: the transfer should take place *"solely to allow tasks covered by the competence of the controller"*.
- The level of protection afforded by a third country or international organisation shall be assessed in the light of *"all circumstances surrounding a data transfer operation or set of data transfer operations"*.



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Assessment of adequacy

- Adequacy Decision adopted by the European Commission: **binding** on all MS and EU i&b
- Adequacy assessed by the controller: the controller should conduct a **specific** adequacy assessment of the data protection system of the recipient.



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Role of the EDPS in the assessment of adequacy

- Adequacy Decision adopted by the European Commission:
 - **no specific procedure**
- Adequacy assessed by the controller:
 - **analysis clearly documented** by controller and made available to EDPS upon request. **Consultation** to be submitted **in case of** (a) novelty, or (b) a clear impact on data subject's rights.



Derogations (Article 9.6)

- Unambiguous consent
- Necessary for the performance of a contract between d.s. and controller
- Necessary for the conclusion of a contract in the interest of the d.s.
- Necessary or legally required on important public interest grounds
- Necessary to protect vital interests of the d.s.
- If the transfer is made from a register which is intended to provide information to the public



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Adequate safeguards (Article 9.7)

- Form and nature of the instrument reflecting the AS:
 - * Field of private law: SCC, *ad hoc* contract, etc.
 - * Field of public law: international agreement, MoU, Administrative arrangement, etc.



Role of the EDPS in dealing with derogations

- Article 9.6 derogations:
 - Controller not required to inform the EDPS *ex ante*, but upon request. Consultation if necessary,
- Article 9.7 derogations (AS):
 - No need for prior authorisation or consultation: where Standard Contractual Clauses (SCC) are used.
 - No need for prior authorisation, but consultation might be necessary: when an *ad hoc* binding instrument (as opposed to SCC), is developed by the EU institution or body to be used in either private or public law field.
 - Need for prior authorisation: In exceptional cases where the transfers are based on safeguards developed *ad hoc* and are not incorporated in a legally binding instrument



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Example of the EDPS dealing with derogations

- EDPS Decision of 13 February 2014 concerning the transfers of personal data carried out by OLAF through the Investigative Data Consultation Platform pursuant to Article 9(7) of Regulation (EC) No 45/2001
- https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Adminmeasures/2014/14-02-13_Letter_Kessler_Decision_EN.pdf
- Annex - Draft Administrative Cooperation Arrangement between the "European Anti-Fraud Office" (OLAF) and [The Partner]
- https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Adminmeasures/2014/14-02-13_Letter_Kessler_Decision_Annex_EN.pdf

Special situation: legislation and bilateral agreements

- EU institutions and/or bodies might be required by EU legislation or bilateral agreements to conduct international transfers, as controllers. The instrument should include the appropriate framework for compliance with Article 9.
- The legislation or bilateral agreement in question might already be in force and not comply with Article 9. Controller should adopt complementary measures to ensure compliance with Article 9 before the transfer or set of transfers take place.
- EDPS should be consulted under Article 28(2)



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Supervision and enforcement

- Supervision tools:
 - Prior checks
 - Consultations, complaints handling, inspections
- Enforcement tools:
 - Powers as described in Article 47 (e.g. impose a temporary or definitive ban on processing, refer the matter to the Court of Justice of the European Union, etc.)



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Thank you for your attention!

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