

**Different models to facilitate the  
cross-border exchange of  
personal data**

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# General principles

## Article 44 GDPR

*“Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, **the conditions laid down in this Chapter are complied with by the controller and processor (...)**”*

*“All provisions in this Chapter shall be applied in order to **ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined**”*



# General principles

GDPR confirms criteria already set out in Directive 95/46 →  
International Transfers (ITs) only possible if:

- Other relevant provisions of GDPR are complied with (i.e.: legitimacy of processing operation), AND
- Country of destination offers **adequate level of protection**, OR
- Exporter has provided **appropriate safeguards** by means of one of the instruments listed in the GDPR, OR
- One **derogation** for specific situations may be applied

# Adequacy decisions

- Formal **legal act adopted by the EU Commission** (with participation of EDPB and MS)
- May affect an **international organization, a country, a territory or one or more specified sectors** within that third country
- Assessment takes into account →
  - Rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of public authorities to personal data (...), **data protection rules (...) including rules for the onward transfer** of personal data to another third country
  - **Existence and effective functioning of one or more independent supervisory authorities** in the third country or to which an international organization is subject, with responsibility for ensuring and enforcing compliance with the data protection rules, including adequate enforcement powers (...)
  - **International commitments** the third country or international organisation concerned has entered into (...)
- According to the CJUE the notion of **“adequate level of protection”** must be interpreted as meaning **“essentially equivalent protection”**

# Transfer tools – Appropriate guarantees

- Exporter must provide **adequate safeguards** in a number of tools
- Tools must provide for **enforceable data subjects' rights and effective legal remedies**
- **Without previous authorization** from Supervisory Authority (SA)
  - **Legally binding and enforceable instrument between public authorities**
  - **Binding Corporate Rules (BCRs)**
  - **Standard Contractual Clauses** adopted by **EU COM**
  - **Standard Contractual Clauses** adopted by **SA and approved by EU COM**
  - **Approved Code of Conduct** together with binding commitments of the importer to apply appropriate safeguards, including those related to data subjects' rights
  - **Approved Certification Mechanism**, in the same conditions as Codes of Conduct

# Transfer tools – Appropriate guarantees

- Exporter must provide **adequate safeguards** in a number of tools
- Tools must provide for **enforceable data subjects' rights and effective legal remedies**
- **With previous authorization** from Supervisory Authority (SA)
  - **Ad hoc Contractual Clauses**
  - **Provisions inserted in administrative arrangements (not legally binding)** between public authorities
- Competent SA will seek the favorable opinion of EDPB in terms of art. 63 GDPR

# Transfer tools – Appropriate guarantees

## New situation after CJUE ruling Schrems II

- Transfer tools must also provide an **“essentially equivalent level of protection”**
- If importer is not in a position to comply with the requirements set out in the tools, must inform the exporter
- Exporter and importer must **implement appropriate supplementary measures**
- If they don't, transfer should be suspended
- If t's not, exporter must inform SA

# BCRs

- Applicable to groups of undertakings or groups of enterprises
- Must:
  - Be **legally binding and apply to all members of the group**
  - Expressly **confer enforceable rights on data subjects** with regard to the processing of their personal data
  - **Include contents listed** (not exhaustively) in art. 47.2 GDPR
    - ITs trans included, types of processing operations and their purposes, data subjects affected,...
    - Application of general data protection principles, including legal basis, purpose limitation, data minimization...
    - Security measures,...
    - Rights of data subjects, including right to lodge a complaint before a SA or a court in MSs,...



# Derogations for specific situations

- Already provided for in Directive 95/46 →
  - Explicit **consent**
  - Transfer necessary for the **performance of a contract** between the data subject and the controller or concluded in the interest of the data subject in which the data subject
  - **Important reasons of public interest**
  - Establishment, exercise or **defense of legal claims**,...
- New → (art. 49 second paragraph)
  - Derogation when no other tool or derogation is applicable
  - Transfers based on the **“compelling legitimate interests”** of the controller which are not overridden by the rights and freedoms of data subjects
  - Transfer is not repetitive and concerns only a limited number of data subjects
  - The controller must assess all the circumstances, and on the basis of that assessment provide adequate safeguards with regard to the protection of personal data
  - The controller must inform controller and affected data subjects
  - The controller must document the assessment and the suitable safeguards



Thank you very much for your  
attention!



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