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ADEQUACY AND LOSING IT

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AGENDA |

- Introduction
- Israel: Cross border restrictions and data localization
- EU data transfer restrictions
- EU Adequacy – what is it?
- What Israel did and didn't do to preserve adequacy
- Losing Adequacy – SCCs, supplementary measures, TIAs



CROSS BORDER RESTRICTIONS AND DATA LOCALIZATION

- Protection of Privacy (Transfer of Data to Databases Abroad) Regulations, 5761-2001
- Export of IL personal information - if the law of the recipient country ensures a level of protection not less protective than under Israeli law – **Israeli Adequacy** (Article 1)
- Other means of transfer:
 - data subject consent - Article 2(1)
 - transfer to a corporation under the control of the owner of the database - Article 2(3)
 - importer's contractual obligation to comply with the requirements of Israeli law concerning the storage and use of personal information - Article 2(4)
 - a country which is a party to Convention 108 - Article 2(8)(1)
 - a country which receives data from Member States of the EEA under the same terms of acceptance - Article 2(8)(2)
- No onward transfers - Regulation 3

EU DATA TRANSFER RESTRICTIONS - GDPR

CHAPTER V

- Article 45: Adequacy decisions
- Article 46: Appropriate Safeguards :
 - SCCs
 - Binding Corporate Rules ('BCRs')
 - Codes of conduct, certification mechanisms
 - Ad hoc contractual clauses
- Article 49: Derogations: [if the transfer is not repetitive, concerns only a limited number of data subjects, restricted to specific situations]
 - Data subject consent
 - necessary for the performance of a contract or the implementation of pre-contractual measures at the data subject's request
 - necessary for important reasons of public interest
 - necessary for the establishment, exercise or defence of legal claims
 - necessary in order to protect the vital interests, where the data subject is incapable of giving consent

Adequacy decisions

How the EU determines if a non-EU country has an adequate level of data protection.

PAGE CONTENTS

Adequacy decisions Latest

Documents

The European Commission has the power to determine, on the basis of article 45 of [Regulation \(EU\) 2016/679](#) whether a country outside the EU offers an adequate level of data protection.

The adoption of an adequacy decision involves

- a proposal from the European Commission
- an opinion of the European Data Protection Board
- an approval from representatives of EU countries
- the adoption of the decision by the European Commission

At any time, the European Parliament and the Council may request the European Commission to maintain, amend or withdraw the adequacy decision on the grounds that its act exceeds the implementing powers provided for in the regulation.

The effect of such a decision is that personal data can flow from the EU (and Norway, Liechtenstein and Iceland) to that third country without any further safeguard being necessary. In others words, transfers to the country in question will be assimilated to intra-EU transmissions of data.

ADEQUACY PARAMETERS

- the rule of law, respect for human rights and fundamental freedoms, legislation concerning public security, defence, national security and criminal law and the access of public authorities to personal data
- data protection rules, professional rules and security measures
- rules for the onward transfer of personal data to another third country
- effective and enforceable data subject rights and administrative and judicial redress for the data subjects
- existence and effective functioning of independent supervisory authorities including adequate enforcement powers



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2. מה היה הנימוק המרכזי שסלל את הדרך להכרה? בתי המשפט. הדין הישראלי חלקי למדי בתחום הפרטיות, אבל בתי המשפט השלימו חסרים ופיתחו את המשפט. אז לא טעות, זה חלק משיטת המשפט המקובל. איך אני יודע? כתבתי את הדוח עבור האיחוד האירופי בשעתו.

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PRESERVING ADEQUACY

- PPA an independent authority decision – 2 October, 2022
- Draft Protection of Privacy Regulations (Provisions Regarding Information Transferred to Israel from the European Economic Area), 5782 - 2022 – published 29 November, 2022 award EEA data subjects:
 - Right to be forgotten (upon request)
 - Deletion of excess personal information
 - Obligation to maintain personal information accurate
 - Obligation to inform the data subject of the processing
 - Sensitive information to include trade union membership and racial and ethnic origin



LOSING ADEQUACY = SAFEGUARDS

- למדינות הולמות / Adequacy

...personal data can flow from the EU (and Norway, Liechtenstein and Iceland) to that third country without any further safeguard being necessary. In others words, transfers to the country in question will be assimilated to intra-EU transmissions of data.

- עם בטוחות מספיקות / Safeguards

In the absence of [an adequacy] decision..., a controller or processor may transfer personal data to a third country or... if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available



WHAT ARE STANDARD CONTRACTUAL CLAUSES

- What are the SCCs:
 - standardized and pre-approved model data protection clauses that allow controllers and processors to comply with their obligations under EU data protection law and can be incorporated into their contractual arrangements.
 - contain specific data protection safeguards to ensure that personal data continues to benefit from a high level of protection when transferred outside the EEA.
- The purpose of the SCCs:
 - Demonstrate compliance with GDPR – Art 28(3)+(4)
 - Regulate the transfer of personal data to countries outside of the EEA

WHAT ARE STANDARD CONTRACTUAL CLAUSES

- Exporter must
 - Choose the right module(s)
 - Fill in the blanks
 - Choose between few options
 - Add safeguards – nothing else is negotiable
 - Do a TIA

ANNEX I

A. LIST OF PARTIES

MODULE ONE: Transfer controller to controller

MODULE TWO: Transfer controller to processor

MODULE THREE: Transfer processor to processor

MODULE FOUR: Transfer processor to controller

Data exporter(s): *[Identity and contact details of the data exporter(s) and, where applicable, of its/their data protection officer and/or representative in the European Union]*

1. Name: ...

Address: ...

Contact person's name, position and contact details: ...

Activities relevant to the data transferred under these Clauses: ...

Signature and date: ...

Role (controller/processor): ...

2. ...

Data importer(s): *[Identity and contact details of the data importer(s), including any contact person with responsibility for data protection]*

1. Name: ...

Address: ...

Contact person's name, position and contact details: ...

Activities relevant to the data transferred under these Clauses: ...

Signature and date: ...

Role (controller/processor): ...



KEY CONCEPTS

- EU/EEA Member State law (except Module 4)
 - Third party beneficiary rights legal system
 - Because data subjects have direct rights
- Nonnegotiable
- Unlimited liability
- Can't be used for transfers to adequate jurisdictions / importers subject to GDPR
 - But can be used by non-EU entity subject to GDPR (e.g., Israeli hotel) to transfer to its processors / other controllers



KEY PROVISIONS

- Replicate GDPR:
 - Data protection safeguards
 - Purpose limitation, transparency, accuracy, minimisation, security, sensitive data
 - Onward transfers, documentation, compliance
 - Subprocessors
 - Data subject rights
 - Redress
 - Liability
- Plus:
 - Supervision, jurisdiction
 - Local laws and practices affecting compliance with the Clauses
 - Obligations of the data importer in case of access by public authorities

TRANSFER IMPACT ASSESSMENT

- Identify your data transfers (including onward transfers). The Recommendation notes that this must include onward transfers and sub-processing chains, and so is a “complex exercise”.
- Assess whether the transfer tool is effective in light of national law and practice of the importer + in the specific sector.
- Even if the laws are OK, need to check if public authorities actually breach the laws in practice
- חוק הגנת הפרטיות, חוק השב"כ, חוק האזנת סתר, חוק התקשורת (ס' 13), חוק נתוני תקשורת, חוק יסוד כבוד האדם וחירותו, בג"צ איכון קורונה ע"י השב"כ (סבירות), עין הנץ, פגאסוס
- Adopt supplementary measures where necessary [technical safeguards remain the only failsafe option identified by EDBP].
- Re-evaluate at appropriate intervals.



THANK YOU FOR LISTENING



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