

ΕΛΛΗΝΙΚΗ ΔΗΜΟΚΡΑΤΙΑ
HELLENIC REPUBLIC

Ministry of Justice, Transparency & Human Rights

Informal Justice and Home Affairs Ministers' Meeting- Athens 23-24 January 2014**Discussion Paper – Session 1 (Justice) - 23 January 2014*****International Transfers in the General Data Protection Regulation*****Introduction**

In today's globalised world, personal data are being transferred across an increasing number of geographical and virtual borders and stored on servers in multiple countries or in the cloud. In this changing environment individuals' rights must continue to be ensured when personal data are transferred from the EU to third countries and international organisations as well as when data subjects in the EU are affected and their data are processed by third country controllers regardless of the geographical location of a company or its processing facility.

Data flows are an essential element of the digital economy which has seen an explosion of their volume and a diversification of their nature. Recent revelations about foreign intelligence collection programmes have negatively affected the trust on which international data transfers are based. Trust of European citizens must be restored. Against this background and further to several Member States request within Dapix group discussions, the Commission published in November 2013 a Communication on *Rebuilding Trust in EU-US Data Flows*.¹

The EU data protection *acquis* ensures a high level of protection of individuals with regard to the protection of their personal data. This includes continuity of that high level of protection when data of Europeans are transferred outside the EU. The data protection reform proposed by the European Commission on 25 January 2012 aims at further strengthening this protection. The EU data protection reform should streamline and improve current mechanisms for transferring personal data from the EU to third countries and international organisations.

The Draft Regulation builds on the current system and philosophy of the Data Protection Directive (Directive 95/46/EC). The Commission may recognise that the level of protection ensured by a third country – including certain territories or processing sector- or an international organisation is adequate or not. The adequacy procedure involves Member States representatives and also provides the European Parliament with a right of scrutiny to check if the Commission has used its executing powers correctly. The European Data Protection Board should give the Commission an opinion on the level of protection in the third countries or international organisations.²

¹ COM(2013)846.

² The Commission has so far recognized Andorra, Argentina, Australia, Canada, Switzerland, Faeroe Islands, Guernsey, Israel, Isle of Man, Jersey, the US as regards the Safe Harbour, Uruguay and New Zealand as providing adequate protection. It has not so far issued any "negative" adequacy finding.

One of these adequacy decisions adopted by the Commission concerns data transfers for commercial purposes between the EU and US (Commission Decision 250/2000/EC³). The current "Safe Harbour" decision allows free transfer of personal information from EU Member States to companies in the US which have signed up to the Safe Harbour Principles in circumstances where the transfer would otherwise not meet the EU standards for adequate level of data protection. The functioning of the Safe Harbour relies on commitments and self-certification of adhering companies. Signing up to these arrangements is voluntary, but the rules are binding for those who sign up. There are specific roles for US authorities (Department of Commerce, Federal Trade Commission, etc.) including on enforcement. The Commission has recently presented a new report on the functioning of Safe Harbour⁴ with 13 recommendations to improve the functioning of the scheme by summer 2014. On the basis of the implementation of these recommendations the Commission will then review the functioning of the scheme. Furthermore, the Commission proposes in the Regulation to grandfather existing adequacy findings, without prejudice to the possibility to repeal, suspend or amend such adequacy decisions.

Transfers to third countries can also take place if the data controller or the processor applies appropriate safeguards including Binding Corporate Rules and contractual clauses. Such transfers could take place on an equal footing as adequacy decisions.

Transfers can also be based on derogations in specific situations. The accountability based approach proposed by the Commission has been further reinforced during the discussions in the Council by allowing transfers based on approved codes of conduct and approved certification mechanisms.

A major issue refers to applicable law. EU data protection law should apply to data controllers established in third countries whenever they offer goods and services, such as information society services, to data subjects residing in the Union irrespective of whether a payment by the data subject is required, or whenever behaviour, including online behaviour, of EU residents is monitored by controllers/bodies/organisations established in third countries as far as this behaviour takes places in the EU.

Questions

In light of the above, the Presidency invites Ministers to:

- 1) Confirm that EU rules should apply to data controllers established in third countries when personal data of EU residents are being processed in the following context, namely: a) offering of goods or services, irrespective of whether a payment by the data subject is requested, to such data subjects in the EU; or b) the monitoring of data subjects' behaviour as far as their behaviour takes place within the EU.

³ Commission decision 520/2000/EC of 26 July 2000 pursuant to Directive 95/46 of the European Parliament and of the Council on the adequacy of the protection provided by the Safe Harbour Privacy Principles and related FAQs issued by the US Department of Commerce in OJ 215 of 28 August 2000, page 7.

⁴ COM(2013) 847.

2) Indicate how the protection of rights and freedoms of individuals should be ensured when the transfer of personal data to third countries is based on derogations from an adequate level of protection (adequacy findings or appropriate safeguards).

3) With regard to transfer of personal data to third countries, indicate whether the models referred in the draft Regulation (adequacy findings/appropriate safeguards, binding corporate rules, derogations as mentioned in Art. 44) are sufficient or alternative models and /or variations of the proposed models should be considered.