

Brussels, 12 May 2021

WK 6400/2021 INIT

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WORKING PAPER

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From:	Presidency
To:	Delegations
Subject:	Presidency note on European Data Protection Board (EDPB) Statement 04/21 on international agreements including transfers

Delegations will find attached a Presidency note on European Data Protection Board (EDPB) Statement 04/21 on international agreements including transfers.

PRESIDENCY NOTE

on European Data Protection Board (EDPB) Statement 04/21

“on international agreements including transfers”

for the meeting of the Working Party on Tax Questions (Direct Taxation) of 21 May 2021

I: BACKGROUND

1. The increase in the automatic exchange of information, both within the EU, under Directive 2011/16/EU (DAC), and with third countries, in the framework of the Global Forum on transparency and exchange of information for tax purposes, and the entry into force of Regulation (EU) 2016/679 (the General Data Protection Regulation - GDPR) have enhanced the need to reconcile the commitments for the exchange of information with data protection rights.
2. As this is an issue all Member States are faced with, it featured on the agenda of two High Level Working Party meetings in 2019¹ under the Finnish presidency, mainly in relation to the responsibility for the Member States to duly implement technical and organizational measures to ensure appropriate safety of the personal data (articles 4(7), 5(1)(f) and 24 of the GDPR).
3. The automatic exchange of information in tax matters with third countries in the context of the GDPR was discussed at the High Level Working Party of 22 October 2020 on the basis of a discussion paper² of the German presidency, where were discussed legal arguments in favor of the alignment of the automatic exchange of information in tax matters with third countries with article 49 (1)(d) of the General Data Protection Regulation by emphasizing the recognized important public interest of combating tax avoidance and tax evasion, safeguarding tax revenues and promoting fair taxation³.

¹ Doc. WK 13133/19.

² Doc. WK 9425/20.

³ See also the EDPB guidelines of 2018

(https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf).

II: CURRENT STATE OF PLAY

4. In December 2020, the EDPB issued guidelines⁴ on articles 46 (2) (a) and 46 (3) (b) of the GDPR for transfers of personal data between EEA and non-EEA public authorities and bodies. The guidelines contain general recommendations for the appropriate safeguards under both clauses. In particular, the EDPB elaborated a list of minimum safeguards to be included in international agreements between public bodies to ensure that data subjects whose personal data are transferred outside of the EEA are afforded a level of protection essentially equivalent to that which is guaranteed within the EU by the GDPR.
5. In April 2021, these guidelines were followed by a statement⁵ in which the EDPB – while acknowledging that under article 96 of the GDPR all international agreements concluded prior to 24 May 2016 were to remain in force until amended, replaced or revoked – invited Member States to *“assess and, where necessary, review their international agreements that involve international transfers of personal data, such as those relating to taxation (e.g. to the automatic exchange of personal data for tax purposes), (...) which were concluded prior to 24 May 2016 (...). This review should be done in order to determine whether, while pursuing the important public interests covered by the agreements, further alignment with current Union legislation and case law on data protection, as well as EDPB guidance might be needed.”*
6. For this review, the EDPB recommends the Member States to take into account the GDPR and the Law Enforcement Directive (Directive (EU) 2016/680), the relevant EDPB guidelines applicable to international transfers, as well as the case-law of the European Court of Justice, including the Schrems II judgment of 16 July 2020⁶.

⁴ Guidelines 2/2020 of the EDPB on articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies, https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-22020-articles-46-2-and-46-3-b-regulation_en

⁵ Statement 04/2021 of the EDPB on international agreements including transfers, https://edpb.europa.eu/our-work-tools/our-documents/other-guidance/statement-042021-international-agreements-including_en

⁶ CJEU judgment of 16 July 2020, Case C-311/18, *Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0311>.

III: WAY FORWARD

7. At the High level Working Party of 5 May 2021, the Presidency raised this issue under the AOB items on the agenda. After the Commission invited the Member States to engage with their national data protection authorities, several Member States suggested a coordinated approach to tackle the matters at hand. Some Member States also expressed the need for more detailed guidance on how to proceed in relation to Member States' international agreements that provide for data transfers for tax purposes, as well as on the adequacy under the GDPR of the exchanges of information for tax purposes that occur under the OECD's Common Reporting Standard.
8. Against this background the delegations are invited to reflect on the following questions:
 - On which aspects would a coordinated approach among Member States be useful?
 - Which would be the appropriate lines to take when engaging with national data protection authorities?