WIRTSCHAFTSKAMMER ÖSTERREICH

Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data

The Austrian Federal Economic Chamber provides the following comments:

In general, it is remarkable how quickly the EDSA has published guidelines on the topic of international data transfer (DT) and we are thankful for that.

Nevertheless, in order to make the paper practically applicable, we believe that some improvements need to be made. In the current paper hardly any of the supplementary measures listed would lead to legal conformity and security. E.g. US: the problem of the possibility of mass surveillance under FISA 702 and Executive Order 12333 has been presented as immanent, although the numbers of actual data accesses do not play a significant role. Encryption by the data exporter without access by the importer could be a possibility. However, further clarification is required that regulation of 50 USC § 1881a (FISA 702), which stipulates the release of the key, has no influence on the effectiveness of the measures (e.g. paragraphs 52 and 76 seem to be contradictory. What is meant - in view of the clarification in Use Case 1 - is that encryption is a suitable technical measure).

However, encryption or pseudonymization cannot be the only transfer instruments; one should also think of the costs and energy requirements that these instruments would cause. In terms of the sustainability strategy, this is the wrong approach. We are therefore particularly critical that additional measures in the area of contractual measures are not recognized as sufficient. On the one hand, this would contradict the previous legitimate system of standard contractual clauses and, on the other hand, reduce the fields of application for possible data transfers to a few. The encryption or pseudonymization of all data in international data traffic is simply not feasible. Contractual safeguards with regard to the standard contractual clauses revised by the European Commission provide a good basis for a risk-based approach to international data traffic. In any case, it must be possible to take into account the likelihood of unauthorized data access by foreign authorities.

Furthermore, regardless of the standard contractual clauses under Art 46 Paragraph 2 lit c GDPR or clauses under Art 46 Paragraph 3 lit a GDPR, it should be possible to call the supervisory authorities for help (Art 35 and 36 Paragraph 1 GDPR).

Concerning the steps in detail:

1st and 2nd step: There are no objections to these points, as they have to be fulfilled and implemented by entrepreneurs anyway.

3rd step: Checking the “law of the third country that may impinge on the effectiveness of the appropriate safeguards” represents an enormous (sometimes impossible) effort for companies, especially for the small-scale business landscape in Austria.

In any case, the examination of additional “possible sources of information” according to Annex 3 would constitute a disproportionate additional effort (especially for SMEs). Only publicly available legal acts and official / judicial decisions should be used when reviewing legality.

The burden of the classification of complex legal foreign regulations should not be imposed on companies. In our opinion, the EDSA should set up a database of assessments and classifications of the data protection level of third countries (also combined with recommendations for additional measures).

4th step: Why are contractual measures proposed if these are not effective? Contractual safeguards are usually a matter of civil law, but here data protection law solutions are required. In our opinion, the proposed measures with regard to the revised standard contractual clauses are perfectly feasible in order to create an adequate level of protection.

We expressly welcome the use cases in Appendix 2. The fact that SCC plus supplementary measures do not require prior official consultation is also expressly welcomed.

Best regards

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