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NOTE

From: Presidency
To: Delegations

Subject: Transfers of personal data
- Presidency paper

With a view to the meeting of the Justice and Home Affairs Council on **9 and 10 June 2022**, delegations will find attached the above document.

Transfers of personal data have become a major economic, security and strategic challenge in recent decades. By adopting the European Data Protection Regulation and the Police/Justice Directive in 2016, the European Union supplemented and consolidated an already innovative European legal framework on data protection and made it a global standard.

The European model for transfers of personal data

As regards international transfers, the toolbox established by European texts contains a flagship instrument, the adequacy decision. This is a unique and original legal instrument: the result of bilateral negotiations, it is not an international agreement, but a decision of the European Commission, adopted after receiving an opinion from the European Data Protection Board and following a procedure involving the Member States under the comitology procedure. The European Parliament is also very attentive to work in this area.

The best-known example of an adequacy decision is *Privacy Shield*. Data transfers from the European Union to the United States represent both a considerable quantity of data transfers and a major economic and security challenge on both sides of the Atlantic. This is why, in trade matters, the successive invalidation by the Court of Justice of the European Union of *Safe Harbor* in 2015¹, and then of *Privacy Shield* in July 2020² has had a significant impact on both continents.

¹ Judgment of the CJEU of 6 October 2015 in case C-362/14 ('Schrems I').

² Judgment of the CJEU of 16 July 2020 in case C-311/18 ('Schrems II').

On 25 March 2022, the President of the European Commission and the President of the United States announced that, after almost a year of negotiations, an agreement had been reached ‘in principle’ on the broad outlines of the regulatory reforms needed in the United States to achieve the level of safeguards necessary for the adoption of a new adequacy decision allowing transfers of personal data to certified companies in the United States. An adequacy decision may be adopted by the Commission if, in accordance with the requirements referred to by the CJEU, sufficient guarantees on compliance with the principles of necessity and proportionality with regard to access to data by public authorities are provided for, and if a redress mechanism open to European citizens and residents who meet the criteria laid down by the Charter of Fundamental Rights is established. The aim is to ensure that the rights of the individuals whose data is transferred are fully respected. The adoption of this decision represents a considerable challenge for the European Union: it is a question of finding an agreement to allow economic actors to pursue their activities, in full compliance with EU law as interpreted by the Court of Justice of the European Union.

There are also several other adequacy decisions that are currently in force:

- eleven adequacy decisions were adopted by the Commission under pre-GDPR law³;
- Four adequacy decisions have been adopted since the entry into force of the GDPR: three fall within the scope of the GDPR, relating to transfers to Japan, the United Kingdom and South Korea, and one adopted under the Police/Justice Directive for transfers to the United Kingdom.

³ https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en/ - Andorra, Argentina, Canada, Guernsey, Faroe Islands, Isle of Man, Israel, Jersey, New Zealand, Switzerland, Uruguay

These adequacy decisions are an important tool for promoting the European model; it is also important to note that several States have developed similar transfer tools in their domestic law and some, in particular the United Kingdom and Switzerland, automatically recognise as adequate transfers of data to third countries that are recognised as adequate by the Commission; in addition, Japan has adopted its own adequacy decision for transfers from Japan to the European Union in parallel with the European adequacy decision.

To remain legally sound, adequacy decisions need to be evaluated on a regular basis. They may also be of a provisional nature where particular risks of legislative divergence are identified.

In addition, the GDPR provides for other transfer tools, such as standard contractual clauses, which are by far the most used transfer tool, binding corporate rules and appropriate safeguards in other legally binding instruments. They are indispensable because the adequacy mechanism is very demanding, and is therefore not feasible with all third countries, even though data transfers are necessary. Standard contractual clauses are, moreover, a tool for transfers that is spreading in many third countries.

The role of personal data transfers in international trade and political fora

The issue of international flows of personal data in bilateral and plurilateral trade negotiations, as well as in multilateral fora such as the G7 and G20, has taken on a strategic dimension in recent years. It is often linked to the issue of non-personal data transfers, which is also very strategic, but involves different challenges. The French Presidency has conducted a mapping exercise to identify clauses and declarations relating to transfers of personal data in this context, highlighting major trends in this area and the importance of strong coordination at national and European level, in order to ensure consistent positions in all fora. A Presidency report has been prepared on this topic.

In addition, at the Ministerial Forum for cooperation in the Indo-Pacific region of 22 February 2022, a joint declaration on privacy and the protection of personal data was signed by the European Union, Australia, Comoros, South Korea, Mauritius, India, Japan, New Zealand, Singapore and Sri Lanka, which represent more than two billion people.

In addition, several other international organisations, such as the Asia-Pacific Economic Cooperation (APEC) and the Association of Southeast Asian Nations (ASEAN), have taken up the issue of international transfers of personal data, and competing models are gradually emerging in multilateral fora.

Transfers of personal data: a major security and judicial challenge

The increasing use of digital tools in all areas, including criminal activities, contributes to making the issue of data transfers a crucial issue in terms of security and the fight against crime. The possibility of sharing data with the competent authorities of third countries is often decisive; transfers are possible only in compliance with the European legal framework and within a framework that is in line with the division of competences between the Union and the Member States. Such international negotiations can help to promote the European standard and enhance convergence at the global level.

For example, the negotiation of data protection rules played an important role in the negotiations on the Second Additional Protocol to the Council of Europe's Budapest Convention on Cybercrime. European positions have been coordinated by the European Commission. This will probably also be the case in the negotiations that are beginning on a draft United Nations convention on combating the use of information and communication technologies for criminal purposes.

In addition, several agreements have been negotiated and signed or are in the process of being negotiated between the EU and several third countries (the United States, Canada and Australia) concerning the transfer of passenger name record (PNR) data; These data, which must be collected by air carriers from passengers, contain information such as the passenger's name, dates of travel, itinerary, seat number, baggage data, passenger contact details and the means of payment used. Following an opinion issued on 26 July 2017 by the CJEU, referred by the European Parliament, the requirements of the Court of Justice in relation to PNR data transfers have been clarified.

In addition, the issue of transfers of personal data is also important in the context of certain bilateral visa and visa waiver programmes or agreements.

On *Privacy Shield*, the Commission will be invited by the Presidency to present the state of play of these discussions with the United States, and ministers will be invited to react, in particular, to the prospect of a new adequacy decision for transfers to the United States and the guarantees that appear to be essential in this context.

They will also be invited to answer the following question: given that international transfers of personal data have become a major strategic challenge in several important areas of public policy, do you agree that, as a result, a coherent and ambitious European policy must be carried out in a consistent manner by the various institutional players, in particular the Commission and the Council?