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NOTE

From:	Presidency
To:	Delegations
Subject:	Presidency Report on the exchange of police data with third countries – Experiences in the application of Article 37 of the Law Enforcement Directive

Delegations will find in the Annex a *Report of the Presidency on the exchange of police data with third countries – Experiences in the application of Article 37 of the Law Enforcement Directive*.



Exchange of police data with third countries – Experiences in the application of Article 37 of the Law Enforcement Directive

Report by the Presidency

Introduction

The coronavirus pandemic has illustrated the importance of close international cooperation and information exchange in all areas of public life. Just as dangers and threats do not stop at national borders, public authorities must be in a position to cooperate across borders in order to ensure the security of their citizens. This is as true for fighting pandemics as it is for fighting crime.

The European Union is an area of freedom, security and justice. Police cooperation to combat crime – not only among Member States, but also with third countries – is a key element in safeguarding that area of freedom, security and justice, where fundamental rights are consistently respected. The ability to exchange the necessary information with the competent bodies in third countries is a precondition for effective police cooperation. This includes the transfer of personal data. At the same time, the Member States are required to ensure that the protection of personal data is not undermined when such transfers take place.

Chapter V of the Law Enforcement Directive (LED) provides the legal framework for the transfer of personal data to third countries and international organisations. In the absence of an adequacy decision by the European Commission for the third country in question in accordance with Article 36(1) LED, data exchange is subject to the condition that appropriate safeguards to protect personal data exist. According to Article 37(1) LED, there are two alternative ways to establish appropriate safeguards: first, appropriate safeguards may be provided in a legally binding instrument; second, the controller may carry out a self-assessment of whether appropriate safeguards exist in the third country, considering all the circumstances surrounding the envisaged data transfer. Where appropriate safeguards within the meaning of Article 37(1) LED cannot be established, personal data can only be transferred in specific situations and to the extent strictly necessary under the derogations set out in Article 38 LED.

A number of difficult practical questions concerning the interpretation and application of the LED arise in this context. That being the case, the Presidency raised the topic of data transfers to third countries on the basis of appropriate safeguards in the Working Party on Data Protection. In doing so, the Presidency intended to obtain an overview of the practices, experiences and needs of Member States and Schengen associated countries in the field of data transfers to third countries for law enforcement purposes.

The present document outlines the work on the topic and presents the observations by the Presidency drawn from the discussion in the Working Party. The document builds on and is meant to be read in conjunction with WK 7388/2020 and WK 9875/2020.

Work within the Working Party

On 14 July 2020, the Presidency sent out a questionnaire to the Member States¹ concerning the practical elements of applying the alternative instruments of Chapter V of the LED, in particular of the use of Article 37, for the transfer of personal data to third countries (WK 7388/2020). The questionnaire consisted of three parts that focused on different aspects of international data transfers for law enforcement purposes. The first set of questions concerned the scope of the use of Articles 37 and 38 LED in the Member States. The aim was to obtain an understanding of whether all of the alternative instruments are used by the competent authorities in the Member States and if so, to what extent. The second part of the questionnaire intended to shed more light on how the competent authorities in the Member States deal in practice with the requirement under Article 37(1) LED that appropriate safeguards must be established either through a legally binding instrument or by way of a self-assessment by the controller. The questions concerned, inter alia, the legal standard applied for appropriate safeguards within the meaning of letters (a) and (b) of Article 37(1) LED. The last part of the questionnaire touched upon the relevant factors for the assessment by the controller of whether appropriate safeguards exist with regard to a third country.

The Presidency received written contributions from 23 Member States. The Presidency analysed and produced a summary of these contributions. This summary was provided to the Member States on 30 September 2020 (WK 9875/2020). It also included a number of follow-up questions which further fleshed out some of the issues addressed in the questionnaire. Eleven Member States submitted written comments on the follow-up questions.

The results of the survey were presented and discussed in the Working Party on 28 October 2020. The Presidency's initiative was welcomed by the Member States as a valuable and timely contribution to ongoing discussions on international data transfers. The Commission emphasised the value of the survey for further work on the clarification of appropriate safeguards and suggested its results be made available to the European Data Protection Board.

¹ For the purposes of this document, 'Member States' refers to Member States and Schengen associated countries.

Observations by the Presidency

The Presidency makes the following observations:

1. The European Commission has as yet not adopted any adequacy decisions under the LED. The possibility for such a decision is for the first time being examined in the context of the future relationship with the UK. Therefore, for the time being and for the foreseeable future, the competent authorities will further depend on the alternative instruments set out in Chapter V of the LED in order to transfer personal data to third countries.
2. The LED itself offers the controller little guidance on the formal and material requirements for appropriate safeguards. It does not provide a conclusive catalogue of criteria or precise procedures for determining whether appropriate safeguards are in place, as it does for the Commission's evaluation of the adequacy of the level of data protection in third countries.
3. So far, there has been no guidance at EU level on how to interpret and determine appropriate safeguards under the LED. The European Data Protection Board has issued guidelines, recommendations and opinions on the application of the alternative instruments set out in Chapter V of the General Data Protection Regulation (GDPR), including the interpretation and use of appropriate safeguards within the meaning of Article 46 GDPR.² These recommendations and opinions do not, however, concern data transfers under Chapter V of the LED. Apart from that, the European Data Protection Board has shared its views in its contribution to the consultation on a draft additional protocol to the Budapest Convention and has, in that context, made a proposal for a data protection clause³. However, that contribution does not offer general guidelines on how to interpret and apply the term appropriate safeguards within the meaning of Article 37(1) of the LED.

² Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, adopted on 25 May 2018; Opinion 4/2019 on the draft Administrative Arrangement for the transfer of personal data between European Economic Area (EEA) Financial Supervisory Authorities and non-EEA Financial Supervisory Authorities, adopted on 12 February 2019; Guidelines 2/2020 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, adopted on 18 January 2020; Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data, adopted on 10 November 2020; Recommendations 02/2020 on the European Essential Guarantees for surveillance measures, adopted on 10 November 2020.

³ EDPB contribution to the consultation on a draft second additional protocol to the Council of Europe Convention on Cybercrime (Budapest Convention), 13 November 2019. The EDPS Opinion 3/2019 regarding the participation in the negotiations in view of a Second Additional Protocol to the Budapest Cybercrime Convention of 2 April 2019 could also give some guidance in this context.

4. Only some Member States have adopted provisions specifying the requirements for appropriate safeguards within the meaning of Article 37(1) LED. In only some Member States, the Data Protection Authorities have given general guidance on the minimum requirements of appropriate safeguards or have assisted controllers in determining appropriate safeguards by evaluating information about the level of data protection of (specific) third countries.
5. Data exporters in the Member States face the practical problem that in many cases they lack access to sufficient information to assess and determine whether appropriate safeguards within the meaning Article 37(1)(b) of the LED are in place. In practice, this lack of information may lead the competent bodies to rely far more on the derogations stated in Article 38(1) of the LED for international data transfers than would be necessary if they had firm knowledge of third countries' legal situations and practices. As a result, the practical scope of application of Article 37(1) of the LED may be overly limited and the tools provided by Chapter V of the LED may not be used to the fullest extent possible.
6. In order to facilitate the effective use of the alternative instruments for international data transfers throughout all Member States, further guidance to the competent authorities should be provided at EU level. To this end, the European Data Protection Board (EDPB) should engage in developing a toolbox including guidelines, recommendations and good practices, in particular with regard to appropriate safeguards within the meaning of Article 37(1) LED, which should be based on a pragmatic approach taking into account the needs of the competent authorities. In particular, further clarification would be useful on what constitutes appropriate safeguards within the meaning of Article 37(1) LED and on the minimum requirements for such safeguards. Moreover, further guidance should be provided on how appropriate safeguards within the meaning of Article 37(1)(b) LED are to be assessed by the controller. In particular, what factors may be considered in such an assessment should be clarified. Apart from that, it could be specified on what occasions an assessment of the existence of appropriate safeguards should be carried out. Finally, further advice on which sources of information should be used for an assessment of appropriate safeguards pursuant to Article 37(1)(b) LED would be helpful.

7. The concept of information pooling at EU level for the purpose of the assessment of appropriate safeguards should be further explored. A central collection which contains information on the level of data protection in third countries and can be accessed by the competent authorities in the Member States would support and streamline the process under Article 37(1)(b) LED. Such an information pool could be fed by the Member States, on a voluntary basis and respecting national confidentiality provisions, and by European Union bodies, such as the Commission, the EDPB, Europol or Eurojust. It could include legislation of third countries, case-law concerning third countries as well as reports and assessments on the legal situation in third countries. Such a system should be designed in a way to support the competent authorities in their tasks and should not have the effect of increasing the workload or making data exchanges with third countries even more complex.
8. When clarifying the alternative instruments under Chapter V of the LED, due regard should be given to the practical needs of and conditions for the transfer of personal data to third countries in the area of law enforcement. Constraints going beyond what has been established by the relevant EU acquis and case-law of the European Court of Justice could have a significant impact on police cooperation in terms of the reciprocity of exchanges with third countries, which is a principle that serves the security interests of the European Union and its Member States. Therefore, a sufficient margin of discretion should be left to the competent authorities, in compliance with the principles laid down in the LED.

Way forward

With its report, the Presidency hopes to provide input to the work of the competent bodies in the European Union in further shaping the requirements for and the use of appropriate safeguards for a more effective application of Chapter V of the LED, in particular of Article 37(1), in the Member States.

To the Presidency's knowledge, the European Data Protection Board has taken up the issue of international data transfers and intends to develop guidelines or recommendations on the interpretation and use of the alternative instruments under Chapter V of the LED. Apart from that, the Commission is to carry out its first evaluation and review of the LED by May 2022. In this context, the Commission is to examine, in particular, the application and functioning of Chapter V LED in relation to the transfer of personal data to third countries.

The Presidency therefore intends to distribute the present document as well as Working Documents WK 7388/2020 and WK 9875/2020 to the European Data Protection Board and the Commission for consideration und further use.