

Info note



EDPB Plenary meeting, 09-10 November 2020

ITEM 3.2 - 10 November 2020 - INFO NOTE - Recommendations [nr/2020] on the European Essential Guarantees for surveillance measures - Adoption

I. Background

The BTLE ESG submits the draft of the Recommendations on the European Essential Guarantees for surveillance measures for adoption by the plenary.

These recommendations are an update of the Working Paper 237 of the WP29, as mandated by the plenary in its meeting of 23 July 2020. The rapporteurs for the recommendations were [REDACTED]. The final draft is submitted after several ordinary and extraordinary remote meetings of the BTLE subgroup, and several additional remote meetings by the drafting team of rapporteurs.

Following the Schrems I judgment, the Working Party 29 drew upon the jurisprudence to identify the European Essential Guarantees, which need to be respected to make sure interferences with the rights to privacy and the protection of personal data, through surveillance measures, when transferring personal data, do not go beyond what is necessary and proportionate in a democratic society.

These European Essential Guarantees are based on the jurisprudence of the Court of Justice of the European Union related to Articles 7, 8, 47 and 52 of the Charter of Fundamental Rights of the EU and, as the case may be, on the jurisprudence of the European Court of Human Rights related to Article 8 of the European Convention on Human Rights dealing with surveillance issues in States party to the ECHR.

The update of this paper is meant to further develop the European Essential Guarantees, by reflecting the clarifications provided by the CJEU since it was first published, in particular in its landmark Schrems II judgment. The relevant references to the ECtHR case law have also been kept.

The aim of the updated European Essential Guarantees is to provide a list of elements to examine whether, when transferring personal data, surveillance measures allowing access to personal data by public authorities in a third country, being national security agencies or law enforcement authorities, can be regarded as a justifiable interference or not.

Indeed, the European Essential Guarantees form part of the assessment to conduct in order to determine whether a third country provides a level of protection essentially equivalent to that guaranteed within the EU but do not aim on their own at defining all the elements which are necessary to consider that a third country provides such a level of protection in accordance with Article 45 of the GDPR. Likewise, they do not aim on their own at defining all the elements that might be necessary to consider when assessing whether the legal regime of a third country prevents the data exporter and data importer from ensuring appropriate safeguards in accordance with Article 46 of the GDPR.

Therefore, the elements provided in this paper should be seen as the essential guarantees to be found in the third country when assessing the interference, entailed by a third country surveillance measures, with the rights to privacy and to data protection, rather than a list of elements to demonstrate that the legal regime of a third country as a whole is providing an essentially equivalent level of protection.

The Essential Guarantees should not be assessed independently, as they are closely interlinked, but on an overall basis, reviewing the relevant legislation in relation to surveillance measures, the minimum level of safeguards for the protection of the rights of the data subjects and the remedies provided under the national law of the third country.

The assessment of the third country surveillance measures against the Essential Guarantees may lead to two conclusions:

- The third country legislation at issue does not ensure the EEG requirements: in this case, the third country legislation would not offer a level of protection essentially equivalent to that guaranteed within the EU.
- The third country legislation at issue satisfies the EEG.

When assessing the adequacy of the level of protection, pursuant Article 45 GDPR, the Commission will have to evaluate whether the EEG are satisfied as part of the elements to be considered to guarantee that the third country legislation as a whole offers a level of protection essentially equivalent to that guaranteed within the EU.

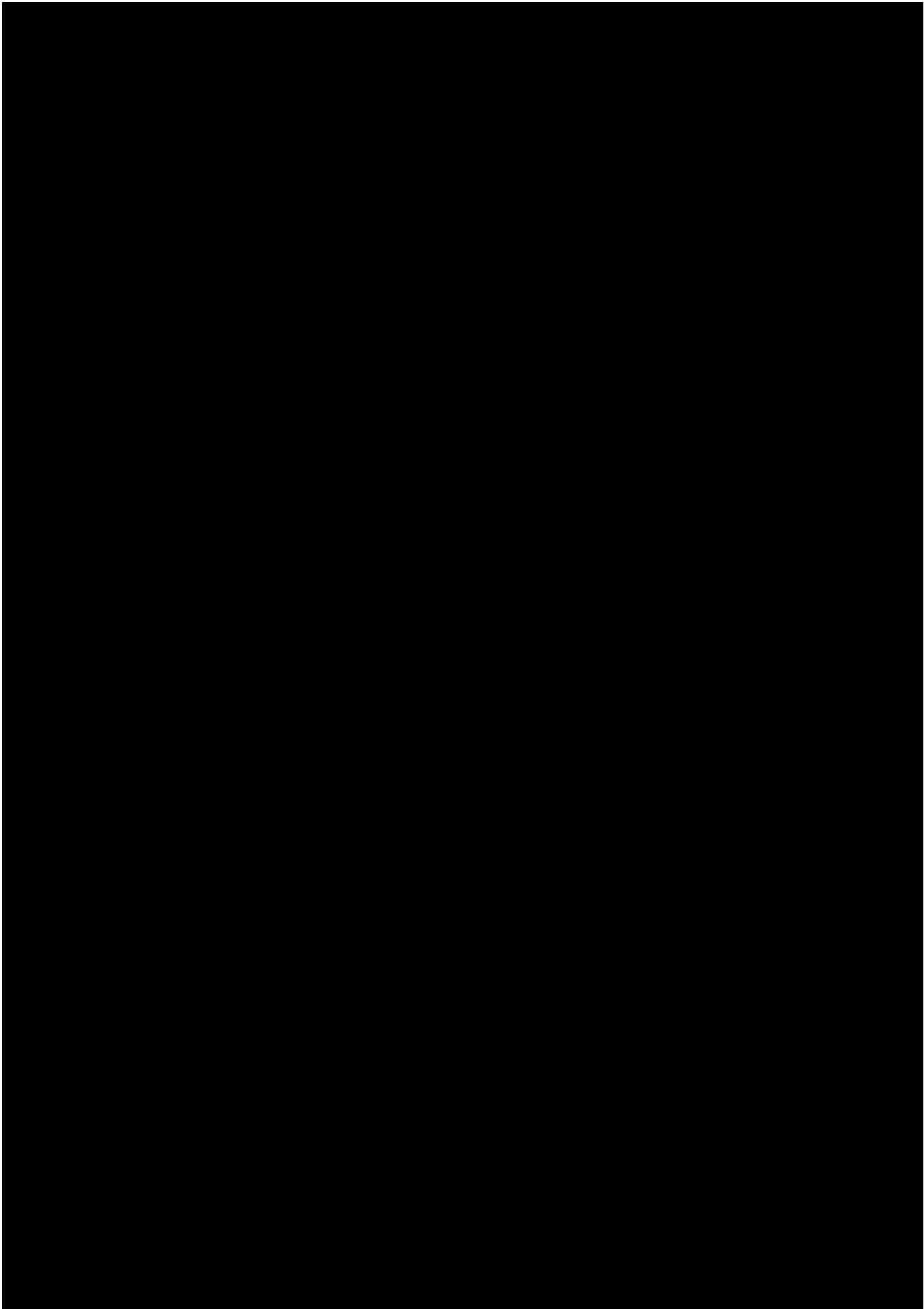
When data exporters rely, along with the data importers, on appropriate safeguards under article 46 of the GDPR, given the requirements of the third country legislation specifically applicable to the data transferred, they would need to ensure that an essentially equivalent level of protection is effectively achieved. In particular, where the law of the third country does not comply with the EEG requirements, this would imply to ensure that the law at stake

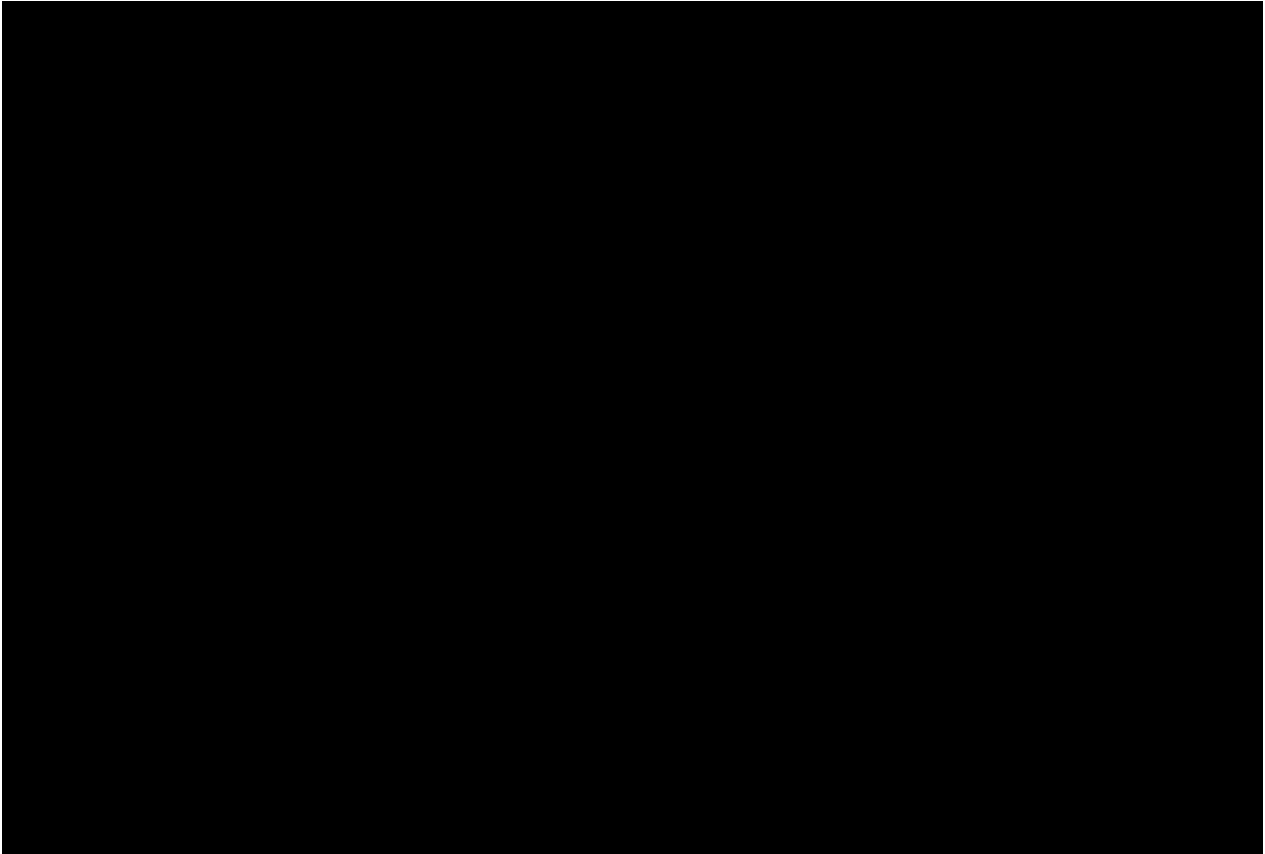
will not impinge on the guarantees and safeguards surrounding the transfer, in order for a level of protection essentially equivalent to that guaranteed within the EU to be still provided.

How this may or may not be achieved, is to be decided in the recommendation on the supplementary measures.

More specifically, based in particular on the more recent jurisprudence of the CJEU, including the Privacy International and La Quadrature du Net and others judgments of 6 October 2020, the update of the Essential Guarantees addresses, amongst other things:

-) Essential equivalence as the standard to be applied for transfers under Art. 46 GDPR
-) The relevance of the jurisprudence of the ECtHR and the relationship between EU law and the ECHR as clarified by the CJEU in its most recent judgments
-) Laws permitting interferences must also define the scope of the limitation on the exercise of the right concerned
-) Rights to challenge surveillance measures must be “actionable” before courts
-) Clarifications on data retention laws, as applicable in the EU
-) Clarifications on independent oversight, such as on the Ombudsperson mechanism, which, if designed as in the Privacy Shield, does not provide a sufficient remedy as required by EU law.





III. Request to the Plenary:

The BTLE ESG requests the plenary to discuss the draft and, in particular, the points for discussion, and adopt the recommendations.