ONTIER

PRIVACY AND DATA PROTECTION INTERNATIONAL TEAM

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TRANSFER OF PERSONAL DATA

EU data protection law restrict the free flow of personal data from locations within Europe to locations outside Europe. The reasoning behind this rule is simple: if Data Controllers are permitted, without restrictions, to transfer personal data to countries without adequate data protection regimes then the protection afforded by EU law will be ineffective. However, many countries are adopting data protection laws based on the European model which should broaden the freedoms of Data Controllers.

Current situation

The legal position under the current European directive (Directive 95/46/EC) is clear: all exports of personal data from within the European Economic Area (**EEA**) to non-European Economic Area countries (referred to in this article as '**third-countries**') are prima facie unlawful unless there is an appropriate level of protection for the rights and freedoms of data subjects. Flowing from this general prohibition are a number of exemptions (known as derogations) whereby personal data may be transferred to third-countries without breaching the data export restrictions. These derogations are included in the text of Directive 95/46/EC. The following countries are the only countries which are considered safe under the current directive (and under the proposed GDPR): Andorra, Argentina, Canada, Faroe Islands, Guernsey, The Isle of Man, Israel, Jersey, New Zealand, Switzerland and Uruguay. In the case of Canada, the freedom is qualified and in the case of the United States, there is a privacy shield in operation, which is beyond the scope of this article but should be studied and understood before any such transfers take place.

What's new?

Exports of personal data to third-countries are not significantly different under the GDPR as under Directive 95/46/EC. The basic rule remains that the transfer of personal data from the EEA is prohibited unless one or more of the safeguards or derogations apply. Article 41(1) permits the Commission to deem a third country's data protection legislation adequate. And where third-countries are not considered adequate the Commission may approve model contractual clauses which EEA companies can use for data exports. EEA counties' supervisory bodies may also approve model contractual clauses for this purpose subject to approval from the European Data Protection Board.

GDPR Article 43 formally recognises Binding Corporate Rules (**BCRs**) and the requirements largely follow the current situation. Where Data Controllers or Data Processors rely on BCRs or approved model contractual clauses (whether pre-approved by the commission or state specific supervisory authority), no further authorisations (such as permits) are required for transfers to take place. Any model contractual clauses that do not follow the standard will require approval from local supervisory bodies.

If organisations wishing to export data do not have a decision on the adequacy of their export scenario and the relevant safeguards are not present, it is still possible to rely on the eight derogations set out in Article 44, being:

• informed consent;
• necessary for the performance of a contract between the data subject and the Data Controller, or pre-contractual steps taken at the data subject's request;
• necessary for the conclusion or performance of a contract between the Data Controller and a third party, concluded in the data subject's interest;
• necessary on important public interest grounds;
• necessary for the establishment, exercise, or defence of legal claims;
• necessary to protect the vital interests of the data subject or of another person, where the data subject is incapable of giving consent;
• the transfer is made from a public registry; or

• necessary for the purposes of the legitimate interests pursued by the Data Controller or Data Processor which cannot be qualified as frequent or massive, and the Data Controller or Data Processor has assessed the transfer and adduced appropriate safeguards, where necessary.

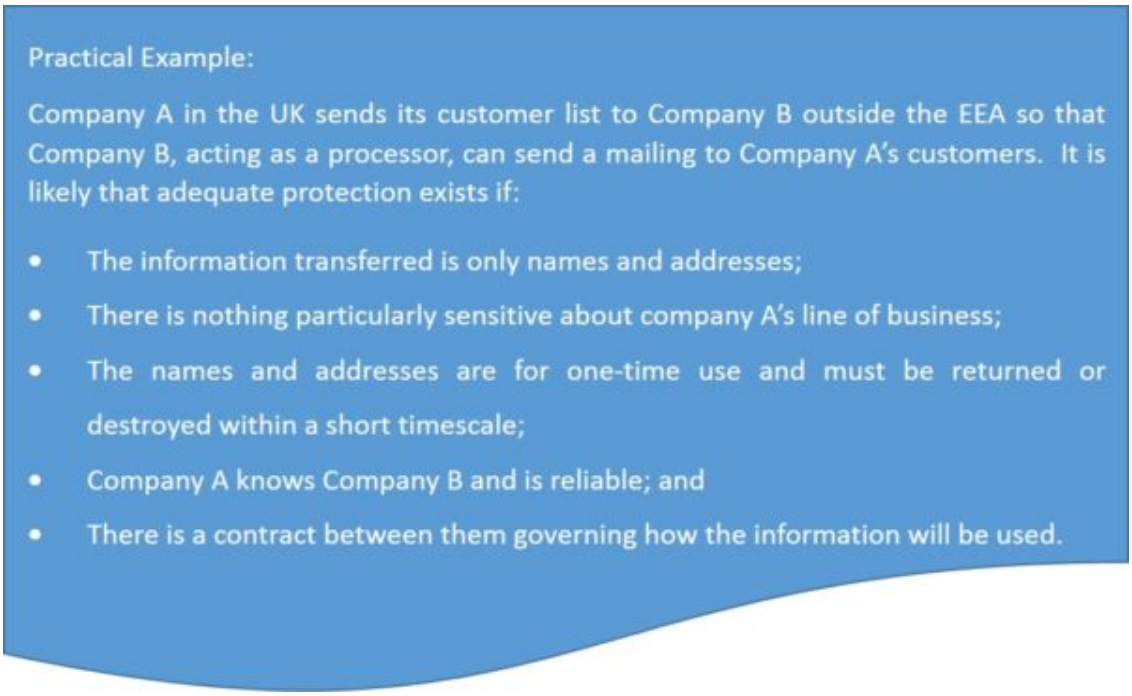
The only new derogation offered by the GDPR is that the transfer is necessary for the purposes of the legitimate interests pursued by the Data Controller/Data Processor, as long as the transfers are infrequent and not massive.

What to do to adapt?

Organisations that transfer data overseas on a regular basis should consider adoption of Binding Corporate Rules. BCRs offer the most flexible solution for third-country data transfers and are gaining popularity. The approval process for BCRs is also becoming more streamlined.

Orgainsations should also review their relevant contracts with companies based in third-countries for model contractual clauses. Now is a good time to re-negotiate contracts on the basis of adequacy determinations.

In addition, Data Controllers must also carry out privacy impact assessments in relation to any profiling operations, which need to be documented in order to comply with the accountability principle introduced by the GDPR.



Practical example

Company A in the UK sends its customer list to Company B outside the EEA so that Company B, acting as a processor, can send a mailing to Company A's customers. It is likely that adequate protection exists if:

• The information transferred is only names and addresses;
• There is nothing particularly sensitive about company A's line of business;
• The names and addresses are for one-time use and must be returned or destroyed within a short timescale;
• Company A knows Company B and is reliable; and
• There is a contract between them governing how the information will be used.

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