EDRi's comments and proposals
on the Chapter V of the General Data Protection Regulation

Ahead of the trialogue negotiations on July 14, EDRi would like provide comments on selected key elements of the Chapter V on the transfer of personal data to third countries or international organisations.

Article 3 - Territorial scope

The Council and Commission proposals cover the activities of controllers and processors established in the EU, but limit it to the controllers when there is no such establishment.

Following this approach, the activities of a large number of processors that are not established in the EU, but nonetheless processing data of EU data subjects, would not be covered and Article 26 of the Regulation on Processor would fall outside this scope.

EDRi's proposal for Article 3.2

"This Regulation applies to the processing of personal data of data subjects residing in the Union by a controller ***or processor*** *not established in the Union, where the processing activities are related to:"*

Article 40 - General principle for transfers

Article 40 of the Regulation, setting general principles for the transfers of personal data should be maintained. Clear general rules are needed to ensure data subjects' control over their personal information during the transfer and at rest in the EU or outside.

EDRi's proposal for Article 40

*"Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall **not be permitted unless**, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation."*

Article 41 - Transfers with an adequacy decision

Experience in the EU have proven the need to ensure a greater level of scrutiny of the mechanisms used to assess whether a third country guarantees an adequate level of protection for personal data. Clear safeguards are needed in the evaluation process, conclusion and re-assessment of an "adequacy decision" granted to third countries for the transfer of personal data.

We therefore recommend that:

- The Commission be empowered to adopt **delegated acts** in accordance to Article 86 to that a third country ensures adequate level of protection
- The Commission shall **consult** the European Data Protection Board during the assessment process, prior adopting a delegated act
- **Sunset clauses** for existing and future adequacy decision should be included

These modifications will provide greater legitimacy to the decisions taken by the Commission to grant an authorisation to transfer data to a third country under an adequacy mechanism. A requirement to consult with the EDPB will ensure that a sufficient level of protection for individuals' personal data is guaranteed by the country being evaluated, both during the transfer and at rest. Finally, a sunset clause will allow the European Union to reassess periodically whether the level of protection remains adequate and will encourage third countries to maintain high standards of protection, to ensure the renewal of their adequacy decision, thereby ensuring durable protection for individuals' data.

Article 42 - Transfer by the way of appropriate safeguards

In the absence of delegated acts providing an adequacy decision, transfer of personal data could be authorised if appropriate safeguards are ensured, on the condition that these are subject to strict rules. According to the principle of equal treatment, strict obligations need to be included to ensure that the same rules will apply to companies from third countries and EU companies, when complying with the Regulation.

We recommend that appropriate safeguards shall:

- (a) guarantee the observance of the principles of personal data processing as established in Article 5;

- (b) guarantee data subject rights as established in Chapter III.

Appropriate safeguards shall be provided for by:

- (a) a code of conduct or certification issued or endorsed by a supervisory authority in accordance with Article 38 and 39; or.
- (b) binding corporate rules approved by a supervisory authority in accordance with Article 43; or
- (c) standard data protection clauses adopted by the Commission in accordance with the examination procedure referred to in Article 87(2); or
- (d) standard data protection clauses adopted by a supervisory authority; or
- (e) contractual clauses between the controller or processor and the recipient of the data approved by a supervisory authority in accordance with paragraph 4.

The issuing or endorsement of codes of conduct and certifications referred to in paragraph (2) at (a), the approvals of binding corporate clauses and contractual clauses referred to in paragraph (2) at (b) and (e), and the adoption of standard clauses referred to in paragraph (2) at (d), when related to processing involving a data transfer or transfers, shall be subject to the consistency mechanism referred to in Article 57.

To guarantee legal certainty, this list must be closed.

Certification mechanisms and codes of conduct can be allowed to provide “appropriate safeguards” for transfers, **only if** they are issued or at least endorsed by a supervisory authority and they are subject to the consistency mechanism.

Nonetheless, the issue of codes and seals must be treated with extreme caution. Experience shows that they are very difficult to enforce, making their use for country transfers highly risky. Both of the above-mentioned criteria must be fully respected. Otherwise, all references to these measures as appropriate safeguards for third country transfer should be deleted.

Article 43 - Transfer by way of binding corporate rules

EDRi welcomes the compromise proposal suggested by the EU Parliament ahead of the trialogue negotiations on this Article, gathering positive amendments proposed by both the Council and the Parliament which add clarity for the conclusion of binding corporate rules.

We would like to see **further improvements**, such as:

- ensuring that data subject rights are not only enforceable but also explained to the data subject in a **transparent** manner with clear language;
- the re-introduction of the paragraph 3 as follows:

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and requirements for binding corporate rules within the meaning of this Article, in particular as regards the criteria for their approval, including

transparency for data subjects, the application of points (b), (d), (e) and (f) of paragraph 2 to binding corporate rules adhered to by processors and on further necessary requirements to ensure the protection of personal data of the data subjects concerned.

Article 43a - Transfer or disclosure not authorised by Union law

In light of the mass surveillance revelations, which have profoundly undermined trust in online communications tools, there is an urgent need for transparency, predictability and proportionality. As a first step towards rebuilding this trust – trust that laws that protect individuals' fundamental rights are not being broken, trust that democratic decision-making is not being subverted and undermined, trust that societies that claim to be free do not monitor all of their citizens, **we call for the re-introduction the text proposed under Article 43a of the EU Parliament's first reading on the GDPR.**

Article 44 - Derogations for specific situations

Article 44.1.h of the Commission proposal and Council general approach authorise the transfer of personal data to third countries *"for the purposes of legitimate interests pursued by the controller*".
The Council has made a small, but inadequate, first step to limit this loophole by adding *"which are not overridden by the interests or rights and freedoms of the data subject".* However, it is important to note that controllers are naturally predisposed to giving greater weight to their own interests, which prevents them from coming to an even-handed assessment.

Therefore, we strongly recommend deleting the paragraph (h) of Article 44.1 and its mention in Article 44.4 and 44.6.

For more information, please contact Joe McNamee at *joe.mcnamee@edri.org*

European Digital Rights is an association of 33 privacy and civil rights organisations.
Comments have been jointly prepared and endorsed by the following EDRi members and digital rights organisations:

access

BITS OF FREEDOM
VERDEDIGT DIGITALE BURGERRECHTEN

fipr

FUNDACJA PANOPTYKON

PRIVACY INTERNATIONAL