



27 JANUARY 2025

Article 48 GDPR in the context of adequacy decisions

Executive summary

We welcome the EDPB's draft guidelines on Art. 48 as an opportunity to clarify the framework for international personal data transfers and the valid legal bases.¹

However, the draft guidelines currently seem to impose an obligation on companies to deep dive into international agreements and treaties, in some cases even having to assess the aims of third-country public bodies and their proportionality. Moreover, whilst the draft guidelines provide helpful information regarding the General Data Protection Regulation's (GDPR) Art. 6,² they fail to address the role of adequacy decisions as a legal basis for companies with branches or headquarters abroad.

The EU-US Data Protection Framework (DPF) is essential to increased trust and reliability for data flows and should be supported as in the latest EDPB information note,³ especially given mounting pressure on international trade.⁴ The final guidelines should:

- ▶▶ Provide guidance for cases where requests from third-country administrative authorities are directed to a company's entity in the same third country;
- ▶▶ Better recognise and support adequacy decisions; and
- ▶▶ Not disproportionately prioritise one legal basis over others, as stated in the recent EDPB draft guidelines on legitimate interest.⁵

¹ Draft Guidelines 02/2024.

² Regulation (EU) 2016/679.

³ EDPB, *Information note on data transfers under the GDPR to the United States after the adoption of the adequacy decision on 10 July 2023*, available at https://www.edpb.europa.eu/system/files/2023-07/edpb_informationnoteadequacydecisionus_en.pdf.

⁴ See our input to the *First review of the EU-US Data Privacy Framework*, available at <https://www.digitaleurope.org/resources/first-review-of-the-eu-us-data-privacy-framework/>.

⁵ See DIGITALEUROPE, *Legitimate interest: One of six legal bases to process personal data*, available at <https://cdn.digitaleurope.org/uploads/2024/11/Legitimate-interest-one-of-six-legal-bases-to-process-personal-data.pdf>.



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Entities in the EU and abroad

The draft guidelines focus on requests received by entities located in the EU,⁶ whilst Art. 48 GDPR itself is not specific to entities located in the EU, nor does it refer to entities located in EU or EEA states.

Where companies – whether European or non-European – have entities abroad, it will likely be these entities located outside Europe who will receive personal data requests from non-EU public bodies, including when the data is located in the EU.

Ignoring requests received by entities in third countries ignores market realities and current practices. EU public bodies also send requests to third-country companies through their EU entities, particularly with the entry into force of the e-Evidence Regulation.⁷

Recognising the role of adequacy decisions

The draft guidelines acknowledge that adequacy decisions provide a legal basis for transfers under Chapter V GDPR.⁸ However, they do not sufficiently explore the importance of such decisions under Article 45 GDPR. We recommend that the final guidelines place greater emphasis on the role of adequacy decisions in assessing the legality of transfers to third-country authorities, highlighting positive use cases. For instance, when an entity in a third country benefiting from an adequacy decision, such as those under the EU-US DPF, is contacted directly, these adequacy decisions provide a critical foundation for determining compliance with GDPR requirements.

International enforcement cooperation between data protection authorities is rightly emphasised as a priority in the EDPB's statement on the second report on the application of the GDPR.⁹ Similarly, the European Commission's second report underlines the importance of strengthening cooperation amongst countries that benefit from adequacy decisions.¹⁰ To this end, we recommend that the final guidelines explicitly reference recently adopted adequacy decisions, as they play a central role in facilitating lawful data transfers and fostering international cooperation within the framework of data protection.

⁶ See the draft guidelines' Executive Summary and paras 4-5.

⁷ Regulation (EU) 2023/1543.

⁸ Paras 28 and 29.

⁹ Statement 6/2024.

¹⁰ COM(2024) 357 final



Compliance with Art. 6 GDPR

We welcome the draft guidelines' level of granularity when it comes to Art. 6 GDPR. However, whilst the EDPB discourages the use of consent as a legal basis, its relevance for B2B relations should be included.¹¹ For example, in B2B cloud storage agreements, commitments can be made to redirect requests to the customer. This example is different from where an investigation is taking place and the subject of the investigation cannot be informed nor give their consent.

We recommend clarifying how to assess whether data processing services are unrelated to economic and commercial activities, as stated in para. 26 of the draft guidelines.

We welcome the recognition of legitimate interest as a legal basis under para. 25 of the draft guidelines. However, para. 26 goes in the opposite direction and limits the legal basis to exceptional circumstances, mostly based on C-252/21 CJEU, which covers cases of large-scale processing and not targeted requests from authorities. Instead, reference to C-708/18 CJEU, which states that the choice of legitimate interest as a legal basis depends on 'individual circumstances of a particular case,' should be made.

We recommend that cases where legitimate interest can be used as a legal basis, for instance for transfers between entities of the same company, be brought forward in the final guidelines.

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¹¹ Para. 21 notes that consent as a legal basis will be 'usually inappropriate.'

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