

INTERNATIONAL DATA TRANSFERS: BACK IN THE SPOTLIGHT

SEPTEMBER 2024

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THE BACKGROUND

On 26 August 2024, the Dutch Data Protection Authority (Dutch DPA) announced that it had imposed a €290 million fine on Uber for allegedly transferring personal data from the EU to US between the periods of 6 August 2021 and 27 November 2023 without an adequacy decision or appropriate safeguards in place, in breach of the GDPR.

What is the relevance of the above dates? On 6 August 2021, Uber updated a joint controller agreement between its Dutch entity and its US entity to remove the standard contractual clauses included therein, with no other transfer mechanism put in place. On 27 November 2023, the Uber US entity certified under the EU-US Data Privacy Framework that was adopted earlier that year.

The investigation began after 172 French drivers complained to a France-based human rights group, which then escalated the complaint to France's data protection regulator, the CNIL. As the Dutch DPA is Uber's lead supervisory authority under the GDPR, it led the investigation.

THE ARTICLE 3 DEBATE

The removal of the standard contractual clauses from the agreement between the US and Dutch entities followed the European Commission's publication of the new **Standard Contractual Clauses** (SCCs) on 4 June 2021, which at Recital 7 state that: "*the standard contractual clauses may be used for such transfers only to the extent that the processing by the importer does not fall within the scope of [the GDPR]. This also includes the transfer of personal data by a controller or processor not established in the Union, to the extent that the processing is subject to [the GDPR] (pursuant to Article 3(2) thereof).*"

This position is also echoed in the **European Commission's FAQs** (see Question 24): "*Can these SCCs be used for data transfers to controllers or processors whose processing operations are directly subject to the GDPR? No.*" The European Commission goes on to say that it is in the process of developing an additional set of standard contractual clauses for this scenario (we are still waiting for these).

In short, the message from the European Commission was that, if the data recipient is subject to the GDPR by virtue of its extra-territorial effect, then the SCCs should not be used. This formed the basis of one of Uber's key arguments, which was that as the Uber US entity was subject to the GDPR by virtue of Article 3(2) (a), i.e. it is processing personal data in connection with offering goods and services to individuals in the EU, Chapter V of the GDPR did not apply.

The Dutch DPA rejected this argument, stating that Uber could in no way have inferred from these statements that the SCCs or other transfer mechanisms need not be used if the processing fell under Article 3 (indeed, while the European Commission haven't published any additional standard contractual clauses, the implication is that something is needed). The Dutch DPA also pointed to Uber's privacy statement as evidence that Uber knew there would need to be an additional safeguard, as it states that in the event of the EU-US Data Privacy Framework being invalidated, Uber will rely on other transfer mechanisms. More generally, the European Commission's statements above have been criticised as a Chapter V mechanism is still needed to counterbalance the difficulties of enforcing the GDPR against parties in third countries.

The Dutch DPA also confirmed that the concept of data transfers under the GDPR is broad. While personal data was shared directly by the Uber drivers by uploading data directly to the servers of the Uber US entity, without any technical intervention by the Uber Dutch entity, this did not matter according to the Dutch DPA. In particular, the Dutch DPA emphasised the intent of the GDPR and the Uber Dutch entity's contractual responsibilities and influence of the process..

KEY TAKEAWAYS

- Additional safeguards must be put in place under Chapter V of the GDPR, even if the data recipient in the third country is subject to the GDPR under Article 3 in respect of the processing. It does not matter if the current SCCs are strictly not fit for purpose or that the European Commission has yet to publish the additional set of standard contractual clauses. If no adequacy decision or other safeguard is in place, then put in place the SCCs.
- Be consistent. Ensure that no statements around privacy practices made publicly could undermine any arguments that you may wish to run later in the event of any issues with a regulator on a data protection position taken.
- A regulator will consider the factual circumstances and not just the technical characteristics of the transfer itself. Be aware of this when considering whether an international transfer under the GDPR is taking place and additional safeguards required.

FOR MORE INFORMATION

If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to the authors listed below.



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