

PhD Thesis Abstract

“European Regulation of Personal Data Transfers to Third Countries: Between Territorial and Organizational Approaches”

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This PhD thesis focuses on the legal issues related to the personal data transfer to third countries, i.e. outside the European Union, and more broadly, outside the European Economic Area. This issue constitutes an essential part of the EU regulation on personal data processing and protection. The analysis focuses on EU law, i.e. the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Official Journal L 281, p. 31), and the Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (Official Journal L 119, p. 1).

Analysis of the EU (protective) regulation concerning cross-border transfers of personal data has been presented in an innovative form. It has been based on the basic division, which occurs in the context of regulating data transfers in different countries, i.e. the territorial-based approach and the organizational-based approach. The first approach focuses on the geographical factor, as well as a comparison of the personal data protection standard in individual countries; it allows the data transfer only if the target state meets specific (e.g. „adequate”) data protection level. The second approach emphasizes the specifics of the data transfer between different entities, organizations (hence, it is referred to as an organizational-based approach). The level of protection that occurs in a particular territory (country) is not of key importance as long as the legal instruments appropriate to the organizational-based approach are concerned. In this context, relations between the data transferors (data exporters) and the entities receiving personal data (data importers) - in particular contractual relationship – are crucial.

This dissertation consists of an introduction, five chapters and a summary. The first, introductory chapter focuses on the reasons for implementation of the protective regulations in the field of cross-border data transfers. It also explains the essence of the territorial-based and organizational-based approaches. Another part of this chapter concentrates on historical analysis, which allows to give a wider context to the EU (previously – Community) regulation.

Second chapter attempts to define the key concepts of the EU regulation of personal data transfer, i.e. „third country” and „transfer of personal data to a third country”. In separate subsections of this chapter attention has been given to institutions of great practical importance, such as the personal data transit through a third country, the re-export (reverse

transfer) of personal data, and operations of onward transfers. In the second chapter the analysis also concentrates on the issues relating to the personal scope of the EU regulation. In the last subsection, qualification of personal data transfers operations is analyzed, in the context of general definition of „data processing” and the resulting consequences.

The third chapter is devoted to territorial-based approach, which is a principle of regulation introduced by the Directive 95/46/EC (Article 25 of the Directive). This chapter, in a great measure, focuses on the construction of the adequacy of data protection in a third country, and attempts to define and understand the nature of legal requirements of „adequate” protection. For this purpose, separate sections present the criteria for assessing the adequacy of protection (including the rules of substantive and procedural nature), and methodologies used to carry out the assessment (i.e. methodology utilized by the UK data protection authority and model used by the Article 29 Working Party). The third chapter also analyzes the decisions of the European Commission on the adequacy of third countries (the so-called adequacy findings), as a primary instrument appropriate for the territorial-based approach. The „Safe Harbor” program has been also analyzed within this chapter, despite the annulment of the Commission decision which was the basis for the program to function. The reason for analyzing this instrument was that the „Safe Harbor” program constitutes an excellent example of a „hybrid” data transfer solution that combines elements relevant to the territorial-based as well organizational-based approach.

The fourth chapter presents characteristic features of the instruments appropriate for organizational-based approach. Particular attention is brought to those defined in the provisions of the Directive 95/46/EC, on the basis of Article 26(2), which introduces the construction of „adequate safeguards”, as the basis for the personal data transfer to the third countries. The structure of the thesis allows to present how the restrictive regulation of Article 25 of the Directive 95/46/EC (that is relevant to the territorial-based approach) has been supplemented by solutions that are organizational-based approach specific. A significant part of the fourth chapter is devoted to the analysis of the data transfer agreements, with particular emphasis on the EU model contractual clauses. Separate considerations were devoted to binding corporate rules, constituting the instrument which has not been provided in the Directive 95/46/EC, but has been created with crucial involvement of the Article 29 Working Party afterwards. A conducted in this regard analysis, allows to identify elements relevant not only to the organizational-based approach, but also to the territorial-based approach, concerning the particular data transfer instruments. The last subsection of this chapter discusses the exceptions to the prohibition of data transfer (referred to in Article 26(1) of the Directive 95/46/EC). A method applied in regard to these exceptions, and based on risk (risk-based approach regulation) allows to classify them as an example of instruments that are appropriate for the organizational-based approach. However, they are not typical for this approach, as exceptions do not require organizations to apply any special measures when transferring the data abroad.

The fifth chapter is devoted to the reform of EU legislation in the field of international transfers of personal data. It presents legislative works on the General Data Protection Regulation, with special attention paid to the solutions and institutions which were criticized under current law. An essential part of this chapter is devoted to the analysis of particular

solutions adopted under Regulation 2016/679; separately in relation to data transfer mechanisms relevant to the territorial-based approach, and those that are specific for the organizational-based approach. A separate subchapter presents a detailed analysis of the judgment by the Court of Justice of the EU in case Maximilian Schrems vs. Data Protection Commissioner, along with the consequences following the judgment, including those connected to the „Privacy Shield EU-U.S.” program which has replaced the „Safe Harbor” program. This highly important topic allows to present, in a comprehensive manner, the changes within the EU's data transfer protective regulation.

The analysis presented in this dissertation allows to demonstrate the correctness of its fundamental hypothesis, according to which the territorial-based approach and the related evaluation of the adequacy of third countries should be maintained in the EU's data transfer regulation. What is more, the mechanisms of personal data transfers, which are derived from organizational-based approach, should be maintained, appropriately strengthened and extended. The first part of the hypothesis justifies the fact that the instruments appropriate to the territorial-based approach allow for a fullest implementation of the underlying objectives of the EU regulation, concerning the personal data protection. Furthermore, these instruments seem to be much better suited for European legal culture and general European approach to the personal data protection. It is highly evident in the context of the CJEU judgement on Schrems case, which highlighted the role of personal data protection as a fundamental right in the EU. The second element of the hypothesis presented in this dissertation, which tries to favor and strengthen the mechanisms specific for organizational-based approach, is related to the attractiveness of these mechanisms. They allow for solutions to alleviate the weaknesses inherent in the territorial-based approach thanks to, *inter alia*, better adaptation to the realities of today's world including economic and technological circumstances. These mechanisms are also far closer to the „Spirit of the Times” in the scope of the EU legislation on data protection, which to a greater extent insists on taking into account the risk level, as well as the circumstances of specific data processing operations. Thus, it has been proposed to complement the current instruments of personal data transfer with the elements inherent to the accountability principle. It should allow to additionally strengthen the importance of mechanisms derived from the organizational-based approach.