

# Article 49 Derogations — Summary Table with Examples

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The “Schrems II” case and subsequent recommendations by the European Data Protection Board show it is not straightforward for organizations in the European Economic Area to rely on “appropriate safeguards,” such as standard contractual clauses, to transfer personal data to third countries. Organizations may be inclined to look to the various derogations under Article 49 of the EU General Data Protection Regulation to see if these may provide alternative ways of transferring personal data. In January 2021, Thomas von Danwitz, the judge-rapporteur in the “Schrems II” case, also suggested the possibility of increased reliance on the Article 49 derogations, although readers should note von Danwitz’s comments were brief and given in a personal capacity.







There are specific recitals that relate to the derogations in Article 49, as well as detailed guidance from the EDPB. Before attempting to rely on the derogations, organizations need to be aware of these additional considerations. This table summarizes this material so readers can see at a glance the factors relevant for each derogation. We have also included citations for all provisions for readers who want to read further on the point. The comments made in this table are also applicable to transfers of personal data from the U.K.







The examples section uses the following “traffic light” indicators to show how likely the various derogations are to be useful in the particular scenario given:

 Red = Unlikely to be possible     Amber = May sometimes be possible     Green = Likely to be possible

ARTICLE 49(1) <sup>1</sup> DEROGATIONS	CONDITIONS FOR USE				EXAMPLES		
	Frequency — Does the transfer have to be “occasional” and “non repetitive” <sup>2</sup> ?	Necessity — Must the transfer be “necessary” <sup>3</sup> ?	Public authorities — Can the derogation be used by public authorities in exercise of their public powers? <sup>4</sup>	Other requirements/ limitations/factors to consider	HR data	Business-to-consumer transaction	Clinical trials data
Consent — Article 49(1)(a)	N/A	No	No	High threshold to be met as consent must be explicit, <sup>5</sup> as well as “freely given, specific, informed” <sup>6</sup> and revocable <sup>7</sup> without detriment. <sup>8</sup>			

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Performance of contract between data subject and controller — Article 49(1)(b) OR	Occasional only <sup>10</sup>	Yes <sup>11</sup>	No	Necessity will be interpreted very narrowly and requires a “close and substantial connection” between the data transfer and the purposes of the contract. <sup>12</sup>			
performance of contract in interests of data subject between controller and another person — Article 49(1)(c)							

ARTICLE 49(1) <sup>1</sup> DEROGATIONS	CONDITIONS FOR USE				EXAMPLES		
	Frequency — Does the transfer have to be “occasional” and “non repetitive” <sup>2</sup> ?	Necessity — Must the transfer be “necessary” <sup>3</sup> ?	Public authorities — Can the derogation be used by public authorities in exercise of their public powers? <sup>4</sup>	Other requirements/limitations/factors to consider	HR data	Business-to-consumer transaction	Clinical trials data
Important reasons of public interest — Article 49(1)(d)	N/A (but see “Other Requirements” column)	Yes <sup>13</sup>	Yes	<ul style="list-style-type: none"> <li>• Can only be used for important public interests recognized under EU law or law of member state to which controller is subject.<sup>14</sup></li> <li>• Although this derogation is not limited to occasional transfers only, transfers under this derogation should not take place “on a large scale and in a systematic manner,” or become “the rule” or in the usual course of business; they should be restricted to “specific situations.”<sup>15</sup></li> <li>• Can be used by private entities, as well as public authorities.</li> </ul>			
Establishment, exercise or defence of legal claims — Article 49(1)(e)	Occasional only <sup>16</sup>	Yes <sup>17</sup>	Yes	<ul style="list-style-type: none"> <li>• Necessity test requires a “close and substantial connection” between the data and the specific establishment, exercise or defence of the legal position.<sup>18</sup></li> <li>• Cannot be used to justify transfer on grounds of mere possibility that legal proceedings may be brought in future.<sup>19</sup></li> </ul>			

ARTICLE 49(1) <sup>1</sup> DEROGATIONS	CONDITIONS FOR USE				EXAMPLES		
	Frequency — Does the transfer have to be “occasional” and “non repetitive” <sup>22</sup> ?	Necessity — Must the transfer be “necessary” <sup>23</sup> ?	Public authorities — Can the derogation be used by public authorities in exercise of their public powers? <sup>24</sup>	Other requirements/limitations/factors to consider	HR data	Business-to-consumer transaction	Clinical trials data
Vital interests of the data subject or other persons — Article 49(1)(f)	Occasional or repetitive	Yes <sup>20</sup>	Yes	<ul style="list-style-type: none"> <li>Only applies where the data subject is physically or legally incapable of giving consent.</li> <li>See Section 2.6 of the Article 49 Guidelines for further guidance on the narrow circumstances when this derogation may be used.</li> </ul>			
Compelling legitimate interests — Article 49(1) sub-paragraph 2	Occasional only <sup>21</sup>	Yes <sup>22</sup>	No	<ul style="list-style-type: none"> <li>Can only be used for “residual” transfers<sup>23</sup> — this derogation is intended as a “last resort” where a transfer cannot be based on Article 45, 46, Article 49(1)(a)–(g) or Article 49 (1) sub-paragraph 2, and the data controller must be able to demonstrate this.<sup>24</sup></li> <li>Transfer must also only concern a limited number of data subjects.<sup>25</sup></li> <li>Controller must also assess all the circumstances of the transfer and, based on that assessment, provide “suitable safeguards,” inform supervisory authority of the transfer, and inform the data subject of the transfer and applicable “compelling legitimate interests.”<sup>26</sup></li> </ul>			

## Endnotes

1 Article 49 (1) of the GDPR (Derogations for specific situations).

“1. In the absence of an adequacy decision pursuant to Article 45(3), or of appropriate safeguards pursuant to Article 46... , a transfer ... of personal data to a third country or an international organisation shall take place only on one of the following conditions:

(a) the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards;

(b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request;

(c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person;

(d) the transfer is necessary for important reasons of public interest;

(e) the transfer is necessary for the establishment, exercise or defence of legal claims;

(f) the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;

(g) the transfer is made from a register which according to Union or Member State law is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, but only to the extent that the conditions laid down by Union or Member State law for consultation are fulfilled in the particular case.

Where a transfer could not be based on a provision in Article 45 or 46, including the provisions on binding corporate rules, and none of the derogations ... is applicable, a transfer to a third country or an international organisation may take place only if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data. The controller shall inform the supervisory authority of the transfer. The controller shall, in addition to providing the information referred to in Articles 13 and 14, inform the data subject of the transfer and on the compelling legitimate interests pursued.”

According to Section 1 of the Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679 adopted May 25, 2018 (the “Article 49 Guidelines”), data exporters should first try to bring an international transfer within one of the mechanisms included in Articles 45 and 46 of the GDPR and, only if such a mechanism is unavailable, should they use any of the derogations under Article 49 (1). Section 1 of the Article 49 Guidelines also states that the derogations must be interpreted restrictively (so that the exception does not become the rule).

2 Recital 111 to the GDPR. Section 1 of the Article 49 Guidelines notes that the term “occasional” as used in Recital 111 (as well as the term “non-repetitive” as used in the “compelling interests derogation” under Article 49(1) sub-paragraph 2 indicates that “such transfers may happen more than once, but not regularly, and would occur outside the regular course of actions, for example, under random, unknown circumstances and within arbitrary time intervals. For example, a data transfer that occurs regularly within a stable relationship between the data exporter and a certain data importer can basically be deemed as systematic and repeated and can therefore not be considered occasional or non-repetitive. Besides, a transfer will for example generally be considered to be non-occasional or repetitive when the data importer is granted direct access to a database (e.g. via an interface to an IT-application) on a general basis.”

3 Recital 111 to the GDPR. Section 1 of the Article 49 Guidelines states that the “necessity test,” which is required under several of the Article 49 derogations, requires an evaluation of whether a transfer of personal data can be considered necessary for the specific purpose of the derogation to be used.

4 Article 49 (3) of the GDPR.

5 “Explicit” consent under Article 49 (1) (a) of the GDPR is a stricter standard than the “unambiguous” consent requirement under Article 4 (11) of the GDPR. See further the Article 29 Working Party's Guidelines on Consent endorsed by the European Data Protection Board adopted on 28 November 2017 (WP259) (the “Article 29 WP Consent Guidelines”).

- 6 Article 4 (11) of the GDPR. Section 2.1.2 of the Article 49 Guidelines provides that the consent needs to be specifically given for the particular data transfer/set of transfers. Section 2.1.3 of the Article 49 Guidelines also reinforces that the consent must be “informed” particularly as to the specific risks of transferring personal data to a country that does not provide adequate protection and that no adequate safeguards are being implemented. This is in addition to the general requirements of informed consent under Article 4(11) and transparency under Article 13, namely that the data subject is properly informed in advance of the specific circumstances of the transfer (e.g. the data controller’s identity, the purpose of the transfer, the type of data, the existence of the right to withdraw consent, the recipients or categories of recipients, etcetera).
- 7 Article 13, namely that the data subject is properly informed in advance of the specific circumstances of the transfer (e.g. the data controller’s identity, the purpose of the transfer, the type of data, the existence of the right to withdraw consent, the recipients or categories of recipients, etcetera).
- Article 7(3) of the GDPR and further the Article 29 WP Consent Guidelines.
- 8 Recital 42 of the GDPR, which provides “Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.”
- 9 However, imbalance of power may often undermine consent being freely given.
- 10 Recital 111 of the GDPR.
- 11 Recital 111 and Article 49(1)(b) of the GDPR.
- 12 Section 2.2 of the Article 49 Guidelines. By way of example, the Article 49 Guidelines say the derogation cannot be used when a corporate group has centralized payment and HR management functions in a third country — here the transfer takes place for business purposes and is not objectively necessary for performance of the employment contract.
- 13 Recital 112 of the GDPR and Article 49(1)(d).
- 14 Article 49(4) of the GDPR.
- 15 Section 2.4 of the Article 49 Guidelines.
- 16 Recital 111 of the GDPR.
- 17 Recital 111 of the GDPR and Article 49(1)(e).
- 18 See Section 2.5 of the Article 49 Guidelines.
- 19 See Section 2.5 of the Article 49 Guidelines.
- 20 Recital 112 of the GDPR and Article 49(1)(f).
- 21 Recital 113 of the GDPR and Article 49(1) sub-paragraph 2.
- 22 Article 49(1) sub-paragraph 2 and Section 2.8 of the Article 29 Guidelines.
- 23 Recital 113 of the GDPR.
- 24 Article 49(1) sub-paragraph 2, Article 5(2) and Article 24(1) of the GDPR.
- 25 Recital 113 and Article 49(1) sub-paragraph 2 of the GDPR.
- 26 Article 49(1) sub-paragraph 2 of the GDPR.