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Opinion on the future of personal data transfers from the EU/EEA to Israel & the Occupied Territories

Executive Summary

1. Why this opinion on transfers to Israel and the OTs is submitted now

The opinion seeks to contribute to discussions about the future of personal data flows between the European Union on one hand and Israel and the Occupied Territories (OTs) on the other. In that context, it seeks to contribute to the review of the 2011 EU Adequacy Decision on Israel under the EU General Data Protection Regulation (GDPR) that is currently underway.

The reason to focus on Israel and the OTs is twofold. Firstly, transfers of EU personal data to this region pose special challenges in the light of international law and the EU's policy of "differentiation" between Israel and the OTs, which has been affirmed by rulings of the Court of Justice of the EU (CJEU). Secondly, they warrant scrutiny because of Israel's extensive surveillance activities that raise questions about potential access by Israeli state security agencies to EU citizens' data. The July 2020 *Schrems II* judgment of the CJEU invalidated EU arrangements for data flows to the United States precisely because of such concerns – with clear implications in relation to other third countries including Israel.

2. Israeli settlements in the OTs in international and EU law

In line with international law including UN Security Council and General Assembly resolutions, the EU has never recognized Israel's sovereignty over the occupied territories and considers Israeli settlements in the occupied territories to be "illegal under international law".

Over time, this position has been progressively translated into the EU's legal and administrative practice, thus giving rise to **the EU's so-called policy of differentiation** which distinguishes between activities of Israel within its pre-1967 borders and its activities beyond the Green Line.

The principle of territorial differentiation has been applied to a number of aspects of EU-Israel relations including trade, EU funding, product certification, consumer labelling and other areas.

The EU's differentiation policy has been validated by CJEU judgments (*Brita* 2010, *Psagot* 2019, and Western Sahara rulings of 2016 and 2018).

This opinion addresses the question of how this policy is and should be applied in the EU's treatment of flows of personal data to Israel and to the OTs. This issue should be seen as an important aspect of the review of the EU Adequacy Decision on data transfers to Israel.

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3. The inadequacy of Israeli privacy law in terms of EU data protection law

Under EU data protection law, personal data may only be freely transferred to a non-EU/EEA[1] country (a so-called "third country") if the European Commission has issued an Adequacy Decision confirming that the country in question provides "adequate" protection to such data.

The tests for adequacy have been significantly tightened since the coming into application of the GDPR in 2018. The CJEU has held that the law in the third country must provide "essentially equivalent" protection to EU data protection law. Furthermore, "onward transfers" of personal data from that third country to another non-EU/EEA country may not "undermine" the protection accorded by EU law. And the authorities in the third country may not give their domestic authorities – in particular, their intelligence agencies – excessive, undue access to the data.

In 2011, the European Commission issued an Adequacy Decision for Israel, based on an assessment that the 1981 Israeli Privacy Protection Act 5741-1981, as amended in 2007 ("PPA"), provided "adequate" protection in terms of the then applicable EU data protection instrument, the 1995 EC Data Protection Directive. However, as the Opinion shows, this decision was fundamentally flawed, even then, in terms of the then-applicable standards.

Since then, the EU standards have been very significantly tightened, while the Israeli Privacy Protection Act has changed little, if at all.

The Opinion shows that the Israeli Privacy Protection Act manifestly fails to meet the now-applicable GDPR standards in terms of substance, procedure, enforcement, and undue access to data by the Israeli security and intelligence agencies.

4. Issues of territoriality

In line with general EU policy, the 2011 Adequacy Decision on Israel stipulates that it only applies to Israel within its internationally-recognised 1967 borders. In EU data protection terms, all transfers of EU personal data from Israel to any country or territory outside those borders constitute "onward transfers" for which special safeguards must be adopted.

However, the Israeli PPA applies in the Golan Heights and East Jerusalem, which have been annexed by Israel, in the same way as it does in Israel proper and there are no restrictions on transfers of personal data from Israel proper to these areas. Moreover, in practice, for the purposes of the PPA, individuals and companies in the settlements in the West Bank are also treated in the same way as individuals and companies in Israel proper, East Jerusalem and the Golan Heights.

[1] EU data protection law also applies to the three non-EU Member States of the European Economic Area (EEA), Iceland, Liechtenstein and Norway, hence the occasional references in the text to "EU/EEA" and "non-EU/EEA" countries.

In other words: the Israeli approach to the issues of territorial application of the PPA and transfers of personal data to East Jerusalem, the Golan Heights and the Israeli settlements in the West Bank is fundamentally incompatible with the EU views on the territorial scope of EU-Israel relations in general, and with the stipulations in that regard in the 2011 Adequacy Decision on Israel in particular.[2]

Unlike in other areas of EU-Israel relations, the territorial limitations in the EU Adequacy Decision have not been enforced in practice. It appears that the EU quietly tolerates Israel's non-compliance with these provisions.

The current situation is the data protection equivalent of allowing goods from the settlements to be labelled as "Made in Israel" or of allowing settlement entities to benefit from EU funding programmes.

5. Conclusion

In theory, the EU has three options: a) to allow the 2011 Adequacy Decision on Israel to continue; b) to issue a new Adequacy Decision; or c) to repeal or suspend the 2011 decision without replacing it (for now).

It follows from my analyses that the only option that is compatible with the standards set by the CJEU in recent judgments in both the areas of data protection and in relation to territorial differentiation, is the last one: to withdraw or suspend the 2011 Adequacy Decision.

Subsequently, the EU can try and persuade Israel to bring its data protection law and practice in line with EU standards and territorial requirements, and to end indiscriminate mass surveillance, to allow the EU to issue a new Adequacy Decision in the future.

Specifically with regard to territorial differentiation, the EU would have to obtain Israel's agreement to oblige Israeli data controllers and processors to treat onward transfers of EU/EEA personal data to the OTs as "transfers of personal data abroad" and not as internal domestic disclosures.

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[2] These mutually incompatible views are illustrated in charts on pp. 63, 65 and 68 – 69 of the Opinion.