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Center for International Economic Collaboration

Forming Rules for Government Access:

Toward Optimizing the International Flow of Personal and Non-Personal Data

Report from Study Group on Government Access and Trade Rules

(Summary)

May 20, 2022

Center for International Economic Collaboration

Summary

If the government improperly uses data held by the private sector (government access), this may create a direct impediment to international data flow and undermine the trust of individuals and companies that support data utilization. Although necessary and beneficial government access should be possible, clarifying the evaluation criteria and creating a shared set of rule is necessary. Inadequate, unclear, and inappropriate rulemaking negatively impacts the development, maintenance, and expansion of data-related businesses.

For example, if the government improperly and forcibly intervenes in private-sector data management policy, it will probably be forced to respond with actions that are incompatible with safety management measures as well as confidentiality obligations based on other legal obligations, contracts, and operational policies. Moreover, even if some level of government access is justified, demands that exceed the limits of the private sector's voluntary data provision may make it difficult to conduct sound business activities and manage data appropriately. Internationally, different criteria are used by countries and regions to determine the scope of government access to data in the private sector. Meeting these varying criteria will increase both management costs and risks.

Japan's concept of DFFT (Data Free Flow with Trust) has a positive impact on international discussions at the G7, G20, OECD, and other organizations, and government access is considered an important element of the concept. To reduce international friction arising from different ideas about the scope and conditions of appropriate government access, and in accordance with elements conducive to future discussions on appropriate rule formation (hereinafter, "safeguards"), parties should begin discussing the shared criteria that will determine necessary and legitimate government access.

This report summarizes the discussions of a study group established within the Center for International Economic Collaboration (CFIEC), but it does not directly propose rules for government access per se. The main focus is on providing an overview of the current understanding regarding the significance and necessity of safeguards, even as discussions clarify them further. Moreover, although the ongoing discussion about government access is mainly concerned with personal data, the distinction between personal and non-personal data is not absolute. Consideration of aspects other than the protection of personal information, such as trade in the digital field, the economy and other aspects of security, intellectual property protection, and data-driven innovation, are equally important. With regard to supporting international data flow, a comprehensive perspective that includes both personal or non-personal data is necessary. Such a perspective anticipates that diverse viewpoints coexist in an increasingly complex international situation and takes care to provide an overview to avoid arbitrarily excluding differences in specific ideologies and polities.

The reality is that government access takes many different forms, including discussions about the perceptions of legitimacy caused by differences in legislation designed to protect personal information as well as concerns that stem from differences in how national sovereignty relates to data maintenance and management. Regarding what data held by the private sector should be accessible to the government, our discussion suggests that care must be taken when broadening the scope of existing discussions to go beyond just personal information. As much as possible, bias in identifying issues and discussions about safeguards must be avoided. Assuming the following classification foci will assist in that process.

Classification of Government Access

1. Classification by data type: data type (personal or non-personal, including ambiguous types), nature of the data (e.g., 3Vs: volume, variety, velocity), data value (intellectual property, etc.)
2. Classification by degree of enforcement: is it compulsory regardless of the penalties involved and is it voluntarily or spontaneously provided by the private sector
3. Data lifecycle classification: do issues that arise refer to actions taken at the time of data acquisition, or is use after acquisition, provision to non-governmental authorities, alteration, or deletion anticipated
4. Classification by data flow: will data flow directly to the government sector or to organizations designated by the government sector, including certain private actors
5. Classification by the cross-border nature of issues: are issues limited to the relevant country or region, or are they due to demands that cross two or more countries and regions
6. Classification by purpose of government access: what purposes are assumed for government access, such as criminal investigation, security, domestic industry promotion, and the protection of citizens' personal information

These six classification foci recognize the breadth of anticipated issues with government access, but foci 1, 2, and 5 in particular characterize the nature of government access.

Based on the foci listed above, we analyzed a wide range of cases,[1] expanded the scope while still referring to existing discussions on government access, and presented 14 items[2] as elements required for appropriate rule formation in the future (safeguards). The first seven items are based on existing discussions[3] and we add our own discussions regarding their significance, while the remaining items are discussed based on our review. To present many points that can contribute to future rule discussions, we risked overlapping meanings and content across the items. These safeguards should not unconditionally be included in discussions, but will be referenced as necessary for the purpose of confirming candidates or comprehensiveness when appropriate.

[1] Appendix 1. Case Studies on Government Access
[2] Appendix 2. Government Access Rule Elements Regardless of Whether Personal or Non-Personal Information
[3] OECD "Government access to personal data held by the private sector: Statement by the OECD Committee on Digital Economy Policy" (2020 December) https://www.oecd.org/digital/trusted-government-access-personal-data-private-sector.htm (retrieved May 2022); Global Privacy Assembly (GPA), "Adopted resolution on Government Access to Data, Privacy and the Rule of Law: Principles for Governmental Access to Personal Data held by the Private Sector for National Security and Public Safety Purposes", 2021 October, https://globalprivacyassembly.org/wp-content/uploads/2021/10/20211025-GPA-Resolution-Government-Access-Final-Adopted_.pdf (retrieved May 2022); See detailed version for more about existing discussions.

Examples of expanded safeguards that should be considered in government access involving non-personal data

1. Legal basis: There should be a valid legal basis in the country where data is accessed (e.g., the country that possesses the data that the government is requesting or that belongs to the private sector actor)
2. Meet legitimate aims and be carried out in a necessary and proportionate manner: The purpose of government access should be justified and the measures taken should be both necessary and proportionate
3. Transparency: The content and process of government access should be explicit, especially for the private sector providing the data
4. Approvals and constraints: Government access should be approved and constrained in scope
5. Limitations: There should be clear restrictions on the minimum handling and maintenance of data
6. Independent oversight: Supervision and approval by an independent body should be a pre-condition
7. Effective redress: There should be clear mechanisms for challenging and seeking redress against unlawful or inappropriate government access
8. Impartiality and non-discrimination: Partial and discriminatory treatment should be eliminated in the selection of private actors to be accessed by government
9. Uniformity: The application of the legal system for government access should not be arbitrary; it should be carried out using uniform standards and methods
10. Fair and equitable treatment: Treatment must not be arbitrary, unfair, unjust, or idiosyncratic, and should not be based on prejudice or discrimination due to factors such as race, ethnicity, culture, religion, place of residence, or gender
11. Economic rationality: It should not impose excessive costs or burdens on the private actor subject to government access or on society
12. Compensation: Substantial compensation should be provided upon request to companies subject to government access as well as individuals affected financially
13. Limitation of liability: The various liabilities that may arise as a result of a private actor's compliance with government access should be limited or waived for the relevant private actor
14. Conflicts of law: If there is another law or regulation that conflicts with the legal basis for government access, either domestically or internationally, the government should be responsible for handling potential contradictions and conflicts, both before and afterward

In this report, these 14 safeguards are analyzed individually while considering the relevant evaluation criteria. The evaluation criteria for each discipline element are designed to function as indicators to help the government consider potential protective legal benefits and loss of benefits by any party (individual, private actor, or society) as a condition for accepting the relevant government access. We also provide an analysis of the significance of incorporating the relevant safeguards, their relationship to other safeguards, and their relationship to other international rules.

We expect this report to be used in international discussions and that the prospective readers will be policymakers and corporate practitioners. Care should be taken with the scope of the word "access," as it is necessary to discuss not only the forms of data acquisition that can be used exclusively by governments or government agencies, but also arbitrary restrictions on access by others, alterations of the data itself, falsification requests, deletions, concealment, and so forth, in the broad sense of "access."

In parallel with the international rulemaking that is likely to continue, it is also important to consider existing international rules such as the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as well as the handling of illicit government access based on the national laws of the countries and regions where the access is taking place. Furthermore, as a way to collect evidence for rulemaking discussions, quantitative investigation and analysis of the negative economic impact of government access is necessary.

If government access goes unchecked, data held by the private sector will effectively be controlled by the government and government agencies. Determining who should be considered the subject of data governance is important for the utilization and free flow of data. Here, too, it is necessary to respect the philosophy of multi-stakeholders, examine the roles and powers of the government, the private sector, and data subjects, and achieve universal understanding through a clarification of the division of duties. Referring to the 14 safeguards identified in this report, it must be ensured that government access does not adversely affect the digital economy, the sound development of innovation, or the resolution of social issues.

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Center for the International Economic Collaboration

Study Group on Government Access and Trade Rules

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Appendix 1 (Summary)

Government Access Case Studies

Case studies were collected and analyzed to extract elements that would contribute to future discussions on appropriate rule formation (safeguards). Distinctive cases and evaluations are presented below according to the principal classification foci. Descriptions are based on those available at the time the information was provided. It is possible that, in some cases, the legal system has been revised, implementation has changed, or that issues may have been resolved or been alleviated since that time. Moreover, some content is based on the observations of the referencing reporter, meaning that alternative observations may be possible in some situations, but we have tried to include a description from as flexible a perspective as we can.

Case 1. China: Requests for disclosure of confidential technical information in exchange for administrative approval
Case 2. China: Prohibition of cross-border transfer of data collected by automobiles
Case 3. China: Acquisition of voice data by the government for national security purposes
Case 4. India: Mandatory sharing of non-personal data (framework for creating and using high-value datasets)
Case 5. US-EU: Access to data transferred from the EU for the purpose of US government surveillance (Schrems I/II)
Case 6. US-EU: Requests for disclosure of data from abroad relevant to criminal investigations (Microsoft case, CLOUD Act)
Case 7. China: Concerns about unlimited data acquisition by government under the National Intelligence Law
Case 8. Singapore: Use of COVID-19 control app data for criminal investigations

Case 1. China: Requests for disclosure of confidential technical information in exchange for administrative approval

The Chinese government was directly or indirectly forcing foreign companies (especially in high-tech industries) to transfer technology in exchange for access to the domestic market.

In March 2018, the Office of the US Trade Representative (USTR) released an investigative report[4] investigating the unfair, irrational, and market-distorting laws and practices of the Chinese government that aimed to upgrade its industry by acquiring technologies and intellectual property from foreign companies. Based on this, the US government invoked tariffs as policy measures.

The report points to requests for the disclosure of classified technical information in exchange for necessary administrative approvals as one of the technology transfer mechanisms used by the Chinese government. Foreign enterprises in various industries such as ICT, pharmaceutical, chemical, agri-food (especially genetically modified crops), machinery, financial services, and so forth can obtain permission for factory construction and product sales, requiring them to provide detailed information to government agencies. In some cases, such corporate information has been provided to local industries and used for similar industrial activities. There have also been concerns that disclosed information might be given not only to the government but also to third parties after being reviewed by expert panels (composed of representatives of government, industry, academia, etc.) that may involve competing relevant stakeholders. Such expert panels might make review requests in a variety of industries at any stage of a company's operation in China. The revised USTR report states that high-tech industries, particularly aerospace and chemical companies, have faced strong pressure to transfer technology.[5]

The US government has filed a complaint with the WTO Dispute Settlement Body about discriminatory treatment by the Chinese government.[6] In response to these developments in other countries, China has revised its law, and forced technology transfer has been prohibited according to the Foreign Investment Law of 2019. The Data Security Law of 2021 sets the standard for data processing activities in China, and stipulates data security assurances, personal and organizational protection obligations, penalties, and so forth.[7]

[4] The Office of the United States Trade Representative (USTR), "Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974," March 2018.
[5] The Office of the United States Trade Representative (USTR), "Update Concerning China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation," November 2018, p.23.
[6] *Ibid.*, p.5.
[7] Motoo Yuno, "Establishment of the Data Security Law in China" (*Foreign Legislation*, No. 289–1, October 2021) https:dl.ndl.go.jp/view/download/digidepo_11767245_po_02890113.pdf?contentNo=1
(retrieved March 24, 2022).

Case 2. China: Prohibition of cross-border transfer of data collected by automobiles

The Chinese government banned cross-border transfer of data collected about automobiles.

In China, the Cybersecurity Law was enacted in 2017, while the Chinese Data Security Law and the Chinese Personal Information Protection Law were enacted in 2021, thus establishing China's three data protection laws.[8]

In response to these developments, the following bylaws were enacted one after another; "Certain Provisions Concerning the Security Management of Automobile Data (Trial)"[9] were announced for the automobile industry in August 2021, followed by "Requirements Concerning Information Security Technology and the Security Management of Automobile Collected Data"[10] in October 2021. In both cases, cross-border transfer of automobile data is prohibited in principle, and in cases where it is necessary to transfer data across a border, it must pass the cross-border data security assessment conducted by the National Cyberspace Administration.[11] The category of "automobile data and automobile data processors" is broad,[12] and it can be said that the scope of data acquisition is too broad in proportion to the stated purpose. Moreover, it has hindered production and development by Japanese automakers. On the other hand, "Certain Provisions Concerning the Security Management of Automobile Data (Trial)" (Article 11) states that "if there are different provisions in an international treaty or agreement to which China is a party, the international treaty or agreement shall apply, excepting those provisions that China has declared that it shall defer." This suggests that treatment might differ in cases where there is an international agreement.

Case 3. China: Acquisition of voice data by the government for national security purposes

China is building a nationwide voice recognition database for the purpose of national security.

In China, digital strategies are being promoted from the top down, and the government is simultaneously creating public-private sector integrated innovation by fully supporting private companies in priority

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[8] The Chinese names of the three data protection laws are as follows, in the order in which they are described. 「中华人民共和国网络安全法」「中华人民共和国数据安全法」「中华人民共和国个人信息保护法」

[9] 国家互联网信息办公室『汽车数据安全管理若干规定(试行)』 (announced August 16, 2021)
http:www.cac.gov.cn/2021-08/20/c_1631049984897667.htm
(Reference website with Japanese translation: http:maruyama-mitsuhiko.cocolog-nifty.com/security/2021/08/post-fefed0.html?fbclid=IwAR1iu43oAGFGt8-MSFQ6A5JdgmbC2KS_vJLiCIBtaA1b1qiB05dTN3i51LE) (retrieved March 24, 2022)

[10] 全国信息安全标准化技术委员会『信息安全技术 汽车采集数据的安全要求』 (October 2021)
https:www.tc260.org.cn/file/2021-10-19/e5a87bcd-770f-4035-83dd-610e15a34096.pdf
(Reference website with Japanese translation: http:maruyama-mitsuhiko.cocolog-nifty.com/security/2021/10/post-69a493.html) (retrieved March 2, 2022)

[11] *Ibid.* (10) (Article 11) and *Ibid.* (11) (Article 7).

[12] *Ibid.* "(10) (Article 3) In this provision, automobile data includes data pertaining to personal data and important data in the process of design, production, sale, use, operation and maintenance of automobiles. […] Automobile data processors refers to organizations that carry out automobile data processing, such as automakers, parts and software suppliers, dealers, repair shops, and travel service companies. […] Important data means data that, at the time of alteration, destruction, leakage, unauthorized access, or unauthorized use, may threaten national security, public interests, or the legitimate rights and interests of an individual or organization."

industries in terms of funding and policy.[13] In July 2017, the Ministry of Science and Technology of China formulated the "Next Generation Artificial Intelligence (AI) Development Plan." To realize innovation using AI, four priority areas (1. autonomous driving, 2. smart cities, 3. healthcare, and 4. voice recognition) were defined, with leading companies selected for each field.

The Chinese government is collecting personal voice authentication data (biometric data) to build a national voice authentication database for the purposes of counterterrorism and public security by utilizing AI technology that has been developed with significant government support.[14] A leading company in the field of speech recognition is cooperating with the Ministry of Public Security to build a national voice pattern database and develop a pilot version of a surveillance system that can automatically identify the voice of a person of interest from a phone call. The involved company is also a designated supplier of voice pattern collection systems purchased by police stations in the provinces of Xinjiang and Anhui. It offers commercial text-to-speech and recognition apps for mobile phones in China, but the large voice datasets from the apps could also be used for monitoring. It is unclear to what extent the company shares personal information collected for commercial purposes with the Ministry of Public Security, but the company says it may disclose personal information at the request of relevant government departments.

In a 2017 report, a China representative at Human Rights Watch said, "The Chinese government collects the speech patterns of tens of thousands of people, but there is little transparency about the program or the laws that govern the people targeted and how that information is used." They have pointed out that in China, with its continuous unchecked surveillance and retaliation against government critics, it is easy for the authorities to collect and potentially misuse data. However, the Data Security Law was enacted in 2021, after which the handling of data related to government access has improved.

Case 4. India: Mandatory sharing of non-personal data (framework for creating and using high-value datasets)

The Indian government is submitting a report on making the sharing of non-personal data mandatory.

In December 2020, a report on a non-personal data governance framework was submitted by an Indian expert committee.[15] It is frames non-personal data as a public good and envisions data sharing as a way to ensure that Indian society gains the greatest value (especially economic benefits) from the data. That report proposes a new framework that requires data-holding entities to share non-personal data.

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[13] Lee Ji-hye, "Formation and Development of China's Digital Powerhouse Strategy" (*Overseas Investment and Loans*, September 2021) pp.20-26. https:www.joi.or.jp/modules/news/index.php?page=article&storyid=462 (retrieved March 25, 2022); Mitsubishi Research Institute, "Trends toward the Social Implementation of Artificial Intelligence in China"
https:www.soumu.go.jp/main_content/000483136.pdf (retrieved April 4, 2022)
In the field of speech recognition, companies have been improving speech recognition technology by utilizing enormous volumes of high-quality data accumulated by the government as training data.

[14] Human Rights Watch, *China: Collecting Voice Authentication, Data Privacy Threats: The Police Major AI Companies Working together in a Legal Gray Zone* (October 2017)
https:www.hrw.org/ja/news/2017/10/23/310343 (retrieved March 25, 2022)

[15] Ministry of Electronics and Information Technology-Government of India, "Report by the Committee of Experts on Non-Personal Data Governance Framework," 2020.

Specifically, it establishes a Non-Personal Data Authority (NPDA) to oversee rules on non-personal data. Within its regulations, data trustees collect data from data custodians and create and manage high-value datasets (HVDs). Any organization registered in India can request HVD data from the data trustees. The data trustee may collect fees to cover the costs of data processing and so forth. The Indian government hopes that the sharing and use of non-personal data will promote innovation in start-ups and others with limited access to data.

However, the mandatory sharing of data has been criticized by researchers and private companies, as well as other concerned parties.[16] First, critics say that it is costly for companies to collect data, but they are required to share datasets free of charge and with no incentives. Compensation for preparing data for use by third parties and for the value of the data should be considered. Companies should also be shielded from liability that might arise from third-party data use. Second, there is a question of whether anonymized data constitutes non-personal data.[17] Data custodians provide data to data trustees after anonymization, but since data regarding individuals is being collected from more data sources, identifying individuals is becoming easier, even with highly anonymized data. Third, existing research has not provided evidence that sharing large datasets promotes innovation.

For these reasons, the establishment of the NPDA in India is a new idea worth considering, but it is too early for it to be put it into practice, and some have argued that legislation and investment in personal data protection are necessary first.[18]

Case 5. US-EU: Access to data transferred from the EU for the purpose of US government surveillance (Schrems I/II)

There are concerns that personal data transferred from the EU to the United States is subject to surveillance by US government agencies.

In the EU, the "EU Data Protection Directive"[19] was adopted in 1995, so that transfer of personal data outside the EU was only allowed when the European Commission has issued an adequacy decision for the destination country of the data transfer. Although there was no "adequacy decision" with the United States in this specific case, the US and EU agreed to a "Safe Harbor Agreement," which is a framework for obtaining equal protection. Based on this agreement, only companies authorized by the US Department of Commerce may receive personal information.[20]

However, after the 2013 "Snowden Incident" revealed that the US National Security Agency (NSA) was monitoring and collecting data held by IT companies in the United States, Austrian resident Schrems filed a complaint alleging insufficient protection of his Facebook personal data transferred to the United

[16] Jain, R., Pingali, V., "India's non-personal data framework: a critique," *CSI Transactions on ICT* 9, 2021, pp.171–183.
[17] The scope of the proposed statute in the NPD report is as follows: all data not covered by "personal data" in the Personal Data Protection Bill, 2019 (PDP Bill 2019).
[18] Kapoor, A., Nanda, A., "Non-personal data sharing: Potential, pathways and problems," *CSI Transactions on ICT* 9, 2021, pp. 165–169.
[19] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995. https:eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX：31995L0046 (retrieved March 24, 2022)
[20] EU MAG, "Launch of a New Framework for the Transfer of Personal Information between the EU and the US" (Vol. 54, October 2016) https:eumag.jp/behind/d1016/ (retrieved March 17, 2022)

States (Schrems I[21]). In October 2015, the EU Court of Justice ruled that the Safe Harbor Agreement was invalid[22] because the data transferred from the EU could be accessed by US government agencies beyond what is strictly necessary and proportional for national security, the public interest, and law enforcement. Moreover, since the collection and additional processing of personal data was collected as part of US surveillance programs, the Court deemed that people had no opportunities to access, revise, or delete their own data, or to receive administrative or judicial assistance.

As US companies were no longer able to transfer data under the Safe Harbor Agreement, Standard Contractual Clauses (SCC) and Binding Corporate Rules came to serve as the basis for data transfers, but in July 2016, the European Commission adopted the Privacy Shield[23] as a new transfer framework. The Privacy Shield mandates stronger measures to protect the data of EU citizens, stipulating restrictions on and protection from access by US public authorities.

However, Schrems filed another complaint, citing concerns that even if data is transferred in accordance with the Privacy Shield or SCC, they will not be adequately protected in the United States. As a result, in July 2020, the European Court of Justice ruled the Privacy Shield framework to be invalid (Schrem II[24]). The reasons for this decision were 1) that it recognizes, as with the Safe Harbor Agreement, that the needs of US national security, the public interest, and law enforcement take precedence over the fundamental rights of data subjects guaranteed under the EU Charter of Fundamental Rights,[25] 2) that Article 702 of the Foreign Intelligence Surveillance Act (FISA), which is the basis for US intelligence activities, and Executive Order (E.O. 12333), are not limited to the minimum extent necessary in view of the principle of proportionality under EU law,[26] and 3) that the system for submitting complaints in the event of infringement is inadequate, not ensuring legal remedies for data subjects.[27] Meanwhile, the European Commission's decision[28] on SCC within the framework of the EU's General Data Protection

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[21] Judgment of the Court (Grand Chamber) of 6 October 2015, Maximillian Schrems v Data Protection Commissioner, Case C-362/14.
https:eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0362 (confirmed March 17, 2022)
For a commentary, see Hiroshi Miyashita, "EU-US Privacy Shield" (*Keio Law Journal*, No. 36, December 2016), pp. 145-179.

[22] ICR – InfoCom Research, "On the European Court of Justice's Judgment on the Invalidity of the Safe Harbor Agreement" (*InfoCom Law Report*, 2015) https:www.icr.co.jp/newsletter/law20151008-fujii.html (retrieved March 24, 2022)

[23] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Privacy Shield (notified under document C(2016) 4176)
https:eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.207.01.0001.01.ENG (retrieved March 17, 2022)

[24] Commissioner v. Facebook Ireland and Maximillian Schrems, Case C-311/18
https:curia.europa.eu/juris/document/document.jsf;jsessionid=48D66A2471F8C7EE1646CCD64E8CF7A2?text=&docid=228677&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=9718457 (retrieved March 17, 2022)

[25] *Ibid.*, pp.164-165.

[26] *Ibid.*, p.184.

[27] *Ibid.*, pp.191-192; For a commentary, see Corporate Legal Navigation "Overview and Impact of the Invalidation of Privacy Shield (Adequacy Decision to the United States): Ruling in Schrems II by the EU Court of Justice (2020) https:www.corporate-legal.jp/news/3604 (retrieved March 24, 2022).

[28] Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (notified under document C(2010) 593)
https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32010D0087 (retrieved March 17, 2022)

Regulation (GDPR)[29] was found to be valid. An SCC is the conclusion of a contract with a template clause recognized by the European Commission that faced extremely high hurdles prior to its introduction, but following the invalidation of the Privacy Shield, the European Commission revised the SCC in June 2021.[30] The new SCC addresses a wide range of data transfer scenarios and complex data processing. Moreover, regarding the protection of personal data, they included an article on security assurance to achieve the same level of protection as in the EU. The SCC is also designed to counter risks of personal data violations due to government access, such as requiring the data importer to notify to the data exporter when a data access request is received from the government of the country where the data is transferred.

According to a survey in late 2020, SCC is the most used international data transfer mechanism, of particular importance for all kinds of businesses in Europe.[31]

Case 6. US-EU: Requests for disclosure of data from abroad relevant to criminal investigations (Microsoft case, CLOUD Act)

The US government requested the disclosure of data stored outside the country.

In the United States, before the enactment of the Clarifying Lawful Overseas Use of Data Act (CLOUD Act) in 2018, the Stored Communications Act ("SCA" 18 U.S.C. §2703) [32] and other laws about the procedures for providers of telecommunications services and such to disclose data did not explicitly include stipulations about US government agencies and data stored outside the United States.

In 2013, US law enforcement agencies asked Microsoft to provide certain e-mail information, but Microsoft argued that this was an unlawful extraterritorial application of the SCA as it required disclosure of materials stored abroad, since the storage servers were located in Ireland, and filed a petition for the warrant to be ruled invalid. The US District Court dismissed the petition, but when Microsoft appealed, the US Court of Appeals for the Second Circuit recognized the company's argument that the SCA applied to data stored within the United States (Microsoft case).[33]

It was at this point that the US Congress enacted the CLOUD Act,[34] which clearly stated that warrants under the SCA Act had extraterritorial validity, which meant that the Microsoft case was no longer relevant. The CLOUD Act clarifies that the US government can force providers under US jurisdiction to store, back up, and disclose data they store both domestically and abroad.[35]

Communications service providers (CSPs) operating globally may be subject to the laws and regulations of multiple countries, which can cause conflicts between one government's data disclosure request and

[29] Japan External Trade Organization (JETRO), "About the EU General Data Protection Regulation (GDPR)" https:www.jetro.go.jp/world/europe/eu/gdpr/ (retrieved March 17, 2022)
[30] European Commission, "European Commission adopts new tools for safe exchanges of personal data," 2021, https:ec.europa.eu/commission/presscorner/detail/en/ip_21_2847 (retrieved March 24, 2022)
[31] DIGITALEUROPE, "Schrems II Impact Survey Report," 2020.
[32] 18 US Code Chapter 121 - Stored Wire And Electronic Communications And Transactional Records Access, https:www.law.cornell.edu/uscode/text/18/2703 (confirmed March 18, 2022)
[33] United States v. Microsoft Corp., 829 F.3d 197 (2nd Cir. 2018)
[34] Enacted as part (Division V) of the Consolidated Appropriations Act 2018) on March 23, 2018.
[35] CLOUD Act Sec.103(a)(1), 18 USC. Sec. 2713.

another country's legal obligation to restrict data disclosure.[36] In some cases, such judicial conflicts can be resolved through a so-called mutual legal assistance treaty (MLAT), but since the acquisition of data goes through the courts and governments of other countries, these procedures are complicated and take a long time. The CLOUD Act assumes that the United States will conclude executive agreements with other countries that meet certain standards such as respect for the rule of law and allows the governments of both countries to issue orders to submit electronic data directly to the CSP without having to go through the other government. This eliminates the restrictions under US law and does away with judicial conflicts.

However, an agreement under the CLOUD Act does not impose an obligation on CSPs in the United States and other countries to comply with the orders of other countries' governments, and it holds no jurisdiction over CSPs in other countries.[37] Moreover, data disclosure is limited to purposes related to the prevention and investigation of terrorism and other serious crimes, which means that existing high standards under US law must be met before disclosure of electronic data can be requested by law enforcement agencies. Moreover, provider that has received a request to disclose data may file a petition in a US court within 14 days if it reasonably believes that complying with the disclosure would entail a significant risk of violating laws in the other country, allowing it to seek a revision or revocation of the disclosure order.[38]

If the US government requires a Japanese company to disclose data under the CLOUD Act, this may not be consistent with the Constitution of Japan and other domestic laws (Telecommunications Business Act, Personal Information Protection Act, etc.). Moreover, if Japan concludes a administrative agreement with the United States in the future, while that would facilitate the acquisition of cross-border data for investigation purposes, attention needs to be paid to the impact it may have on other international agreements concluded by Japan. Various legal issues need to be considered to realize the concept of Data Free Flow with Trust (DFFT) and to enable appropriate cooperation with investigations while also protecting data subjects.[39]

Case 7. China: Concerns about unlimited data acquisition by government under the National Intelligence Law

In June 2017, China's National Intelligence Law came into effect.[40] There have been concerns that under this law, national intelligence agencies would have virtually unlimited government access to related agencies, organizations, and individuals when conducting intelligence activities at home and abroad.

Article 7 of the National Intelligence Law stipulates that all organizations and individuals shall cooperate with the intelligence activities of the state in accordance with the law and shall be obliged to protect the

[36] US Department of Justice "Promoting Public Safety, Privacy, and the Rule of Law Around the World: The Purpose and Impact of the CLOUD Act", April 2019, pp.2-6.
[37] *Ibid.*, p.5. Moreover, the agreement does not require either government to force companies to comply with orders issued by the other government.
[38] CLOUD Act Sec.103(b), 18 USC. Sec. 2703(h).
[39] Nishimura Institute of Advanced Legal Studies, *Report of the CLOUD Act Study Group: Consideration of and Recommendations on Legal Issues Surrounding Investigations Involving Data Held by Companies* (December 2019)
[40] Shikako Okamura (2017), "China: Enactment of the National Intelligence Law" (*Foreign Legislation*, No.272-2, Aug. 2017) https:dl.ndl.go.jp/view/download/digidepo_10404463_po_02720209.pdf?contentNo=1 (retrieved March 1, 2022.)

confidentiality of the state's intelligence activities, while the state shall protect the organizations and individuals who have cooperated with the intelligence activities.[41]

China's National Security Law, which came into force in 2015, defines national security in Article 2 as the ability to maintain a safe state of "national administration, sovereignty, unity and territorial integrity, social welfare, sustainable economic and social development and other vital interests of the country."[42]

Examining the National Intelligence Law on the premise that national security is defined broadly to include general economic development, we can imagine how Chinese companies that provide telecommunications equipment in other countries may be legally obligated to provide information and potentially forced to submit data obtained from the company's telecommunications equipment to the Chinese government without limitations. Therefore, the National Intelligence Law effectively makes it possible for the Chinese government to acquire personal and non-personal data not only from its own citizens, but also from citizens of other countries who use the products of Chinese companies. The United States, citing national security concerns, passed a bill prohibiting the certification of Chinese telecommunications equipment makers, thereby increasing their exclusion from the US market.[43]

Case 8. Singapore: Use of COVID-19 control app data for criminal investigations

The Singaporean government announced that data from a COVID-19 contact tracing app could be used for criminal investigations.

In March 2020, Singapore began using TraceTogether, a government-approved contact tracing app developed to combat the COVID-19 pandemic. As of March 2022, more than 90% of the population have downloaded this app,[44] with hotels, restaurants, shopping malls, office buildings, event venues and many other places requiring the app for admission.[45]

TraceTogether works by exchanging anonymous IDs with proxies using Bluetooth.[46] At initial use, cell phone number and identification information are registered as user information and stored on a secure server together with randomly generated IDs. Personal location information is not collected, and a temporary ID that is updated regularly is exchanged via Bluetooth among terminals with the relevant application, located in short distance of each other. These anonymous ID data are stored on each person's device and are automatically deleted after 25 days. If a positive COVID-19 test results in a request from the Department of Health to share data, the data is manually uploaded, but if the data has not been uploaded to the Department of Health's servers, the app user may request that their identification data be deleted.

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[41] National People's Congress, "中华人民共和国国家情报法" (2018) http:www.npc.gov.cn/npc/c30834/201806/483221713dac4f31bda7f9d951108912.shtml (confirmed March 1, 2022)

[42] Shikako Okamura, "China: Enactment of the National Security Law" (*Foreign Legislation*, No.264-2, Aug. 2015) https:dl.ndl.go.jp/view/download/digidepo_9480563_po_02640209.pdf?contentNo=1 (confirmed March 1, 2022)

[43] Taisei Toriyama, "US- and China-Made Telecommunications Equipment Exclusion Law Enacted: Huawei and others," Nihon Keizai Shimbun (November 12, 2021) https:www.nikkei.com/article/DGXZQOGN120MP0S1A111C2000000/ (confirmed February 16, 2022)

[44] Instead of downloading the app, TraceTogether Tokens (small devices) can be used.

[45] Embassy of Japan in Singapore, "COVID-19 Outbreak Alert (Part 43) (April 2021) https:www.sg.emb-japan.go.jp/files/100182789.pdf (retrieved March 23, 2022)

[46] TraceTogether Privacy Safeguards, https:www.tracetogether.gov.sg/common/privacystatement/index.html (retrieved March 23, 2022)

The app's initial privacy policy stated that "all Bluetooth data shared with the Ministry of Health will only be used for COVID-19 contact tracing." However, when a senior Singaporean government official announced in January 2021 that "the Singapore Police have the authority to obtain all data, including from TraceTogether, for criminal investigations," it was also noted that participation in contact tracing was practically compulsory. Privacy concerns drew criticism.[47] Following this announcement, TraceTogether's privacy policy was amended to add that "exceptions are made only when data are required for investigations or criminal proceedings relating to serious crimes as defined in the COVID-19 (Temporary Measures) Act."[48]

Privacy concerns have also been raised in countries other than Singapore where contact tracing apps are used.

[47] MIT Technology Review, "Singapore Contact Tracking App Policy Shift, Made Available for Criminal Investigations" (January 2021) https:www.technologyreview.jp/s/230403/singapores-police-now-have-access-to-contact-tracing-data/ (retrieved March 23, 2022)
[48] COVID-19 (Temporary Measures) Act 2020 (No. 14 of 2020), https:sso.agc.gov.sg/Act/COVID19TMA2020?ProvIds=P111-#P111- (retrieved March 23, 2022)

Appendix 2 (Summary)

Discussion of government access safeguards that do not rely on personal and non-personal data

We discussed the "safeguards" required to determine the scope of appropriate government access (elements that contribute to future discussions on appropriate rule formation). The following shows the results of our analysis of safeguards related to the protection of personal information, based on the content of past discussions on that scope and adding new original interpretations (items 1 to 7, described in the text below).

The remaining items have been added as potential safeguards for government access of all types of data, without distinguishing between personal and non-personal data.

1. Legal basis

Evaluation criteria: The legal basis for enforcing government access to personal data exists on the part of the government that is providing access. Along with laws and regulations, both provisions for substantive data handling and procedures for access must be defined.

Significance and role: Providing procedures that prevent a government from exercising powers arbitrarily by clarifying substantive legal grounds for the processing of data on the part of the government as well as improving predictability for companies and individuals whose data are accessed. The absence of government safeguards can cause atrophy and impede data flow.

Relationship with other safeguards: It is anticipated that substantive content will be regulated by "necessity and proportionality" and procedural content by "approval and restriction" (both described below), which may cause some overlap with this element. However, considering that government access is permissible simply by preparing laws and regulations regardless of the content should be avoided, we also include rules concerning content in this element. Moreover, since both rules ensure predictability, there will be overlap with "transparency," but the emphasis here is placed on curbing arbitrary exercise of authority by clarifying the legal basis on the part of the government, while "transparency" is more focused on guaranteeing the rights of data subjects whose data are accessed.

Relationship with other international rules: The idea that procedures for compulsory treatment should be statutory is stipulated in Article 9 of the International Covenant on Civil and Political Rights (ICCPR), for example.

2. Meet legitimate aims and be carried out in a necessary and proportionate manner

Evaluation criteria: The aims of government access need to be legitimate (we agreed that the criteria for judging legitimacy should be independent of the political system). Regarding the need for means, government access should contribute to the achievement of policy objectives, with no non-infringing means available other than related government access. Regarding the proportionality of ends and means, the aims and means of government access should be balanced and the outcome (or degree of infringement of rights and interests) should not be significantly disproportionate to the ends achieved.

Significance and role: This element is the core provision for proper government access and should ensure that the aims are not unjustified and that the legally protected interests of companies and individuals are not unnecessarily infringed upon, even if there are legitimate aims. It is necessary to limit infringement of the rights of companies and individuals to the extent necessary and reasonable to achieve the aims.

Relationship with other safeguards: Initially, we considered "the relationship between data acquisition and the realization of the aims of government access should be strictly scrutinized and rational" to be an independent element in terms of economic rationality, but we then decided that such economic rationality could be incorporated in this element.

Relationship with other international rules: The legitimacy and necessity of objectives are core elements for assessing deviations from principles in trade rules (see discussions of general exceptions in Article 20 of General Agreement on Tariffs and Trade (GATT) and Article 14 of the General Agreement on Trade in Services (GATS)). On the other hand, proportionality is not required in WTO agreements.

3. Transparency

Evaluation criteria: The focus of evaluation is whether the laws and regulations that serve as the legal basis are published and available to those whose data are accessed, and whether the content is detailed enough to judge if these safeguards are satisfied. Moreover, whether the government is proactive in disclosing the operational status of government access (number of cases, increasing and decreasing trends, breakdown of content) and whether data subjects, etc., are notified that government access has occurred to the extent that it does not interfere with the aims of the government access should both be considered.

Significance and role: To determine whether companies and individuals whose data are access have received sufficient disclosure of the relevant laws and whether their content is detailed enough to evaluate if these safeguards are satisfied, it is crucial to ensure opportunities to understand important information such as how much of your data is disclosed and what assistance you can get. Moreover, the disclosure of access information by the state allows citizens to supervise and thereby prevent abuse. Notification to data subjects ensures that the data subjects know how their data are being accessed and gives them the opportunity to check how it matches the elements of government access and to pursue assistance with regard to their rights.

Relationship to other factors: Overlap with "legal basis" was mentioned, yet we have also discussed their differences while still recognizing this overlap. Please see 4.1.1. Moreover, there was initial debate about differentiating between predictability as an independent element and transparency, but we decided to integrate them into this element. Here, we consider the predictability criterion to be fulfilled if the rules are defined and published in enough detail that the data subject can access the rules and determine whether the safeguards are satisfied.

Relationship with other international rules: Article 10(1) of GATT stipulates that laws and administrative decisions, etc. "shall be immediately made public in such a manner that they may be known to governments and traders."

4. Approvals and constraints

Evaluation criteria: Procedural requirements for government access are in place and the content of the procedural requirements is commensurate with the degree of infringement/intervention on the rights of individuals. In particular, when the degree of infringement is large, approval must be obtained by an independent judicial or administrative body.

Significance and role: Stipulating due process, such as the approval of government agencies and independent bodies that implement access, can meaningfully prevent infringement of companies' and individuals' rights and interest by government access that does not satisfy the safeguards. Trust can be ensured and the concerns of companies and individuals who are hesitant to submit data can be dispelled by making it clear that due process guarantees protection against infringement of rights and interests.

Relationship with other international rules: Due process is regulated by Article 9 of the International Covenant on Civil and Political Rights.

5. Limitation

Evaluation criteria: Data accessed must be identified and handled within the confines of the relevant aims (used according to the aims). Moreover, storage of the accessed data must be evaluated in terms of the measures taken to ensure confidentiality, integrity, and useability.

Significance and role: Ensuring that data collected through government access is used for the aims identified by approvals and constraints and are also stored with appropriate protection. The purpose of this policy is to prevent arbitrary use of data by public institutions by ensuring that the data are handled appropriately within the scope initially envisioned even after its provision, and to promote data flow by dispelling the concerns of companies and individuals.

Relationship with other international rules: Principles 4 (Use Limitation) and 5 (Security Safeguards) of the OECD Guidelines on the protection of privacy stipulate related matters.

6. Independent oversight

Evaluation criteria: Data access, use, storage, and so forth must be supervised by an independent organization after the fact.

Significance and role: Access should be supervised after the fact to evaluate whether the safeguards relevant to government access are satisfied by the government agency and independent agency implementing the access. Detecting after-the-fact infringement of the rights of companies and individuals due to unjustified government access that does not satisfy the safeguards is significant because it becomes a cause for redress. By stipulating after-the-fact protection against infringement of rights and interests, trust is ensured, concerns of companies and individuals are dispelled, and data flow is secured.

Relationship with other international rules: The GDPR and other regulations have provisions for supervision by independent supervisory bodies (e.g., the Data Protection Authorities (DPAs)).

7. Effective Redress

Evaluation criteria: With regards to the above rules of access, use, storage, and so forth, legally binding remedies that can be substantially employed by the data subject in the event of a violation by the government must exist. Remedies may include damages for rights and interests.

Significance and role: Ensure that companies and individuals who have been subjected to inappropriate government access are entitled to appropriate redress and compensation, such as reversal of punishments.

Relationship with other safeguards: There was a debate about the relationship with "compensation." See "Compensation" below for details.

Relationship with other international rules: Article 10(3) of GATT states that "each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters." Article 14 of the International Covenant on Civil and Civil and Civil Rights also provides for the right to a trial.

8. Impartiality and non-discrimination

Evaluation criteria: Government access must not have competitive adverse effects (competitive distortion) on the person whose data are accessed.

Significance and role: Government access is significant for ensuring equality of competitive conditions between domestic and foreign companies as well as between foreign companies in the market by not causing distortions with regards to the measure's content (structure and design of measures). If there is a competitive distortion, companies and individuals may be cut off from incentives for data collection (such as refraining from data collection or transfer for fear that their own data will flow unfairly to competitors), so preventing this is important.

Relationship with other safeguards: At the study group's meeting, it was pointed out that there is overlap with "uniformity." This element focuses on the "system and results of government access," that is, the prevention of the competitively distortion effect of the structure and design of measures in themselves, or competitive distortion effects caused by the application of measures, while "uniformity" focuses on the appropriateness of the process by which measures are applied.

Relationship with other international rules: GATT and other international trade laws stipulate principles of non-discrimination (Articles 1 and 3 of GATT, etc.).

9. Uniformity

Evaluation criteria: Uniformity in the operation (process) of government access is ensured. With Article 10, Paragraph 3 of the GATT in mind, how the legal system is operated can be a criterion for determining government access.

Significance and role: Apart from whether or not government access has competitive distortion effects, when arbitrary operation of the legal system with regard government access (non-uniform or impartial interpretation and application of the legal system, etc.), this can seriously harm predictability for companies, and as a result, dampen their economic activity. In particular, if such a risk exists in a foreign

market, companies will be reluctant to share or transfer data to that market, which will have a negative impact on securing international data flow. To address these issues, apart from the competitive distortion effect of government access, the need for rules to regulate the procedural appropriateness of government access was pointed out.

Relationship with other safeguards: See "Impartiality and non-discrimination." Moreover, in cases where the operation of the legal system regarding government access leads to different interpretations and applications depending on the company in question, but if no competitive distortion effects have occurred, this safeguard can be used rather than "impartiality and non-discrimination."

Relationship to other international rules: Article 10(3)(a) of GATT provides that "each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article." The introductory clause of Article 20 of GATT also stipulates the same intent.

10. Fair and equitable treatment

Evaluation criteria: Treatment must not be arbitrary, unfair, unjust, or singular, and should not be based on prejudice or discrimination against race, ethnicity, culture, religion, place of residence, or gender.

Significance and role: This regulates not only anti-competitiveness, but also a wider range of factors such as prejudice and injustice. Regulating a wider range of aspects will ensure trust in how data are handled and promote data flow.

Relationship with other safeguards: Regarding the overlap with "impartiality and non-discrimination," the former focuses on anti-competitiveness, while this element is distinguished by the fact that it regulates broader aspects such as injustice and prejudice.

Relationship to other international rules: Most investment protection treaties (Article 1105 of NAFTA) include provisions for fair and equitable treatment.

11. Economic rationality

Evaluation criteria: To avoid imposing excessive costs and burdens on companies and individuals regarding the provision of data.

Significance and role: By not imposing excessive costs and burdens regarding the provision of data on companies and individuals whose data are accessed, business disruption, infringement of rights, and so forth are prevented. Moreover, by reducing the risk of being forced to bear excessive costs and burdens, this safeguard mitigates concomitant atrophic effects of data collection and transfer, thereby promoting data flow.

Relationship with other safeguards: The study group pointed out a relationship with "compensation." It was pointed out that "compensation" and "economic rationality" are similar in that the government provides compensation when excessive burdens are imposed on companies and individuals and economic losses caused, even when government access is legal.

12. Compensation

Evaluation criteria: Substantial compensation should be made to companies and individuals providing data in consideration of the economic value of the data. However, compensation does not allow improper government access that is restricted by other safeguards.

Significance and role: The purpose of forcing the government to pay for the use of data with asset value is to compensate companies and individuals for their interests, in the same way as property rights. Without such compensation, incentives for data collection in the countries concerned will be reduced, and competition will also be hampered by the fact that data can be used cheaply when shared among domestic companies. As a result, it becomes difficult for business operators to develop their businesses, and data flow itself is hindered, so preventing this is important. Preventing concerns that the economic interests of business operators will be impaired (data that can be sold for a fee will have to be provided free of charge) is also significant. Moreover, the content of "substantial compensation" is controversial; for example, it is necessary to judge whether compensation is always required (there may be cases where compensation is not necessary), and if so, at what level (for example, market price, costs required). Such matters depend on how this term is interpreted.

Relationship with other safeguards: The relationship with "effective redress" is as follows.
It was pointed out that "compensation" stipulates that substantial compensation is made even in the case of lawful government access, while "effective redress" is supposed to compensate for damages stemming from illegal access.

Relationship with other international rules: Under customary international law, government expropriations of corporate and personal property are required to be compensated for public policy purposes, non-discriminatorily, sufficiently, effectively, and promptly. In the EU, compensation is being discussed as one of the issues of B2G data sharing as data laws are amended.

13. Limitation of liability

Evaluation criteria: There are legal limitations of liability for the body that submits the data and the content of the data submitted (the reliability and quality of the data submitted and the limitations of liability for infringement of the data subject's rights). However, this does not apply if the aims of the government access cannot be achieved without liability (such as providing appropriate financial information for taxation).

Significance and role: Preventing companies and individuals who provide data through government access from being held unfairly liable is important. If the above unfair liability were to be imposed, the business operator would opt to not intermediate or transfer data, thus hindering data flow.

Relationship with other international rules: The EU's B2G data sharing element provides for "Private companies and civil-society organisations should not be held liable for the quality of the data in question or its use by public authorities for public-interest purposes."[49]

[49] European Commission, Directorate-General for Communications Networks, Content and Technology, "Towards a European strategy on business-to-government data sharing for the public interest: final report prepared by the High-Level Expert Group on Business-to-Government Data Sharing," Publications Office, 2021, https://data.europa.eu/doi/10.2759/731415 (retrieved May 20, 2022)

14. Conflicts of law

Evaluation criteria: In order to address conflicts of law arising from government access (inconsistencies with other legal systems), ensure that compliance with laws and regulations in the country where government access is implemented does not violate the laws and regulations of that or other countries. Mechanisms to address and resolve contradictions and conflicts in domestic and foreign legal systems should be established.

Significance and role: In the event of a conflict between the legal obligation to provide data via government access and the legal obligation to prohibit data provision to a third party in another country, reducing the burden on companies and individuals by making adjustments in advance is necessary. If there is a legal system that causes such a conflict of law to occur, that risk of conflict might cause business restrictions as companies hesitate to enter the market and business development is hindered. Companies could then be motivated to change the location of their servers or abandon business development to avoid risk. This hinders data flow.

Relationship with other international rules: Article 31 (International access and transfer) of the EU Data Governance Act provides that public authorities, companies, and individuals should take all possible technical, legal, and organizational measures to avoid cross-border transfers of data so as to avoid conflict with laws in the EU laws or its member states. Here, it is stipulated that data may be transferred based on the request of a foreign government and so forth in exceptional cases where certain conditions are met, such as when there is a mutual legal assistance treaty or when appropriate protection is provided in that foreign country.