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The Fundraiser's Transfer of Personal Data from the European Union to the United States in Context of Crowdfunding Activities

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The Fundraiser's Transfer of Personal Data from
the European Union to the United States in
Context of Crowdfunding Activities

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ABSTRACT

European start-up companies must overcome more 'transfer hurdles' when personal data is transferred from the European Union to the US (United States of America) as part of crowdfunding campaign activities. Transfer of personal data is commonly not associated with (small scale) crowdfunding activities. However, the strict rules of the EU GDPR (European General Data Protection Regulation) on safeguarding personal data apply to all companies when data is transferred from the EU to the US - regardless the size of the business.

This article identifies exchange of personal data that takes place between primarily fundraiser and crowdfunding service provider in different steps of fundraising campaigns. The framework for reward-based crowdfunding for goods production that is provided by the US based Indiegogo platform is used as example and context. The article highlights by way of example the obligations that must be met by European fundraisers as "data controllers" when personal data is transferred to Indiegogo. No easy solutions are provided by either European Union or national data protection authorities on how to establish an adequate level of personal data protection. Paradigms on how to secure transfer of personal data to third countries are available in form of so-called standard contractual clauses, but still conditions for transfer of personal data from Europe to the US are hard to comply with. Apart from entering into an *inter partes* agreement on use of standard contractual clauses with the crowdfunding platform provider, a European fundraiser must furthermore make a so-called "transfer impact assessment" to ensure that third party access to personal data is avoided. In the case of transfer of personal data from the EU to the US the fundraiser must consider using encryption of data as a "supplementary measure" to block third party access. Encryption of data is however not suitable for exchange of data in a dynamic crowdfunding campaign so other means for protection of data must be found and applied.

The reason and explanation for making data transfers from the EU to the US that hard for e.g., fundraisers are thus to be found at interstate level in the relation between the EU and the US. According to EU law, more specifically the GDPR and several of the provision of the Charter of Fundamental Rights of the European Union, US security legislation authorises a disproportionate access for US intelligence services to citizens' personal data. A solution on manageable transfer of personal data from the EU to the US may be found before the end of 2022, since a new TADP (Trans-Atlantic Data Privacy Framework) is currently being negotiated between EU and US at top politician level. However, the implementation of the TADP may take some time since the EU legislative framework needs adjustments to make the new transfer possibilities operational.

1. INTRODUCTION

The overall legal framework that governs transfer of personal data from the EU (European Union) to the US (United States of America) is the GDPR (the General Data Protection Regulation)¹. However, electronic transfer of personal data to the US is currently hard to combine with GDPR compliance for more reasons, even though transfers of personal data from the EU to the US form part of every-day business around the EU – e.g. when European companies approach crowdfunding platforms located in the US.²

"Indiegogo" is an example of an US based platform bringing fundraisers and backers together around reward-based crowdfunding having production of goods as target. The platform provider offers various services supporting especially fundraisers in the process from start-up of a campaign over prototype and product production to shipping.³ The flows of "investments" (or contributions) from backers to fundraisers are enormous viewed in context of Indiegogo's annual turnover.⁴

"Indiegogo" is based in the US, and both fundraisers and backers approaching the platform are inquired to agree to the crowdfunding platform's Privacy Policy and make themselves familiar with further Terms of Use, Cookie Policies etc.⁵

Both fundraisers and backers must transfer personal data to the service provider in the process of start-up of a fundraising campaign, and possibly in later production steps of goods. Transfer of money from backer to fundraiser involves e.g. use of personal data to which the crowdfunding service provider or third party transfer manager needs access.⁶

European based companies that consider crowdfunding for goods production at Indiegogo or other US based platform should carefully

¹ REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

² European Commission, 'EU trade relationships by country/region, United States' <<https://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/>> accessed 26 June 2022.

³ Indiegogo, Inc., 'What We Do' <<https://www.indiegogo.com/about/what-we-do>> accessed 26 June 2022.

⁴ Growjo, 'Indiegogo Revenue and Competitors' <<https://growjo.com/company/Indiegogo>> accessed 26 June 2022.

⁵ Indiegogo, Inc., 'Terms of Use' (Effective December 20, 2021) <<https://www.indiegogo.com/about/terms>> accessed 26 June 2022; Indiegogo, Inc., 'Privacy Policy' (Effective December 20, 2021) <<https://indiegogo.trsnd.co/policies>> accessed 26 June 2022.

⁶ Indiegogo, Inc., 'Privacy Policy' (Effective December 20, 2021) <<https://indiegogo.trsnd.co/policies>> accessed 26 June 2022.

identify and analyse the nature of the wanted data in a broader (legal) perspective before signing up for campaign and transfer of any personal data.

When EU based companies transfer personal data to US based crowdfunding platforms, according to the EU legal framework, including the GDPR, the companies must ensure a "adequate level" of protection of the personal data transferred. However, under EU law the US is classified an "unsafe" country in context of transfer of personal data from the EU, since US security legislation provides NSA (the National Security Agency) disproportionate access to personal data, including personal data kept by US companies. The US security legislation thus conflicts with the data protection requirements as set out in the GDPR and several of the provision of the Charter (Charter on Fundamental Rights in the European Union)⁷, including article 8 on protection of personal data.⁸ This makes transfer of personal data from the EU as set out in Chapter V of the GDPR complicated and time consuming.

2. TRANSFER OF PERSONAL DATA TO INDIEGOGO IN THE LIGHT OF EU LAW

Indiegogo is a crowdfunding platform located in San Francisco and is known to attract tech products.⁹ The life-cycle process of crowd funding for goods production includes at least four stages; concept, prototype, production, and shipping. The backer or contributor may contribute to the campaign when it's launched or as long as the campaign runs to get access to the potential/up-coming project.¹⁰

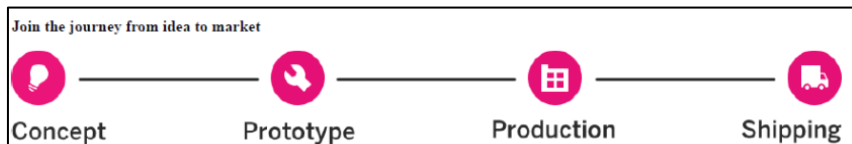


Fig. 1. Source: Indiegogo, 'What We Do' <<https://www.indiegogo.com/about/what-we-do>> accessed 26 June 2022.

Crowdfunding for goods production includes lots of activities related to development and promotion of the potential up-coming

⁷ Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

⁸ Case C-311/18 *Facebook Ireland and Schrems* [2020], paras 168-202.

⁹ Indiegogo, Inc., 'Terms of Use' (Effective December 20, 2021) <<https://www.indiegogo.com/about/terms>> accessed 26 June 2022.

¹⁰ Indiegogo, Inc., 'Backer FAQ', <<https://support.indiegogo.com/hc/en-us/articles/115002383767-Backer-FAQ>> accessed 28 June 2022.

product, including transfer of personal data from the fundraiser to the crowdfunding platform.¹¹

Pursuant to Article 2(1) GDPR, "*processing of personal data*" is subject to GDPR in the EU. The Indiegogo platform addresses this fact in its Privacy Policy, stating that GDPR applies to individuals in the EU.¹² The question whether the EU-based fundraiser's transfer of personal data to Indiegogo in the US also constitutes "*processing of personal data*" emerges clearly from the so-called Schrems II-judgment from June 2020.¹³

According to the CJEU, the operation of having personal data transferred from an EU Member State to a third country constitutes processing of personal data carried out in a Member State.¹⁴ Therefore, also when the fundraiser transfers data out of the EU to Indiegogo based in the US, the GDPR must be complied with.

The so-called data controller has the main responsibility when it comes to GDPR compliance.¹⁵ Pursuant to Art. 4(7) GDPR, the data controller means the natural or legal person which, alone or jointly with others, determines the purposes and means of the processing of personal data. The following appears from Indiegogo's Privacy Policy:

"Indiegogo is "the data controller" of personal data collected by all of Indiegogo, and we are responsible for deciding how personal data is collected, used, and disclosed."¹⁶

Afterwards, Indiegogo gives an account of its legal grounds for use and disclosure of personal data and the rights of the individuals in the EU pursuant to GDPR.¹⁷ This may have a reassuring effect for the fundraiser transferring personal data to this platform. Everything seems totally compliant at first glance.

However, Indiegogo's Privacy Policy should not be overvalued in relation to the specific processing of personal data, which takes place when transferring personal data to Indiegogo. Even though the fundraiser transfers personal to a data controller, also the fundraiser classifies as data controller in this context. Therefore, both Indiegogo and the fundraiser are data controllers in relation to the personal data transferred from the fundraiser to Indiegogo. This is due to the fact that the fundraiser also

¹¹ Indiegogo, Inc., 'Privacy Policy' (Effective December 20, 2021) <<https://indiegogo.trsnd.co/policies>> accessed 26 June 2022.

¹² Indiegogo, Inc., 'Privacy Policy' (Effective December 20, 2021) <<https://indiegogo.trsnd.co/policies>> accessed 26 June 2022.

¹³ Case C-311/18 *Facebook Ireland and Schrems* [2020].

¹⁴ Case C-311/18 *Facebook Ireland and Schrems* [2020], para 83.

¹⁵ Peter Blume, *Den nye persondataret* (2nd edition, Jurist- og Økonomforbundets Forlag, 2018) 73 ff.

¹⁶ Indiegogo, Inc., 'Privacy Policy' (Effective December 20, 2021) <<https://indiegogo.trsnd.co/policies>> accessed 26 June 2022.

¹⁷ Indiegogo, Inc., 'Privacy Policy' (Effective December 20, 2021) <<https://indiegogo.trsnd.co/policies>> accessed 26 June 2022.

decides the purpose and means of the processing of the personal data in question, including making the decision that the personal data should be transferred to Indiegogo in order to receive Indiegogo's crowdfunding service.¹⁸ When the fundraiser as a data controller wants to proceed with a transfer of personal data to Indiegogo, the fundraiser is subject to several requirements under EU law.

3. SAFE TRANSFER OF DATA TO THE US – EU REQUIREMENTS

First, the fundraiser must identify the transfers of personal data to Indiegogo that will take place as a part of the specific crowdfunding activity. This must be done *before* the transfer takes place.¹⁹ Indiegogo inquires different kinds of data from a fundraiser in the support of crowdfunding for goods production, which also emerges from Indiegogo's Privacy Policy that together with Indiegogo's Terms of Use constitute the full agreement between the fundraiser and Indiegogo:

- "Identifiers: Registration information such as name, country of residence, gender, date of birth, email address, phone number, username, and password.
- Commercial information: Fundraiser - (and backer)
- Financial information: information to be submitted to Third-party payment processor when creating a Campaign including limited banking information, contact information such as your phone number, email address, mailing address.
- Compliance information, including e.g., government ID, information needed for tax forms, other information required by our third-payment processor.
- Information chosen to public share, including information sent to other platform user, post etc. that Indiegogo must collect according to US Federal/State Law
- Internet/network or device information

¹⁸ Datatilsynet and Justitsministeriet, 'Vejledning om dataansvarlige og databehandlere' [2017] page 7-12 <<https://www.datatilsynet.dk/Media/7/6/Dataansvarlige%20og%20databehandlere.pdf>> accessed 26 June 2022.

¹⁹ European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 10-11 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June 2022.

- Information obtained from a third party, such as a site or platform provider, about the use of our Site or Services on third-party platforms or devices.
- Location information, including provided by a mobile or other device interacting with one of our Sites or applications (including through beacon technologies), or associated with your IP address, where We are permitted by law to process this information.
- Activity information about your use, and the use by any person(s) you authorize through your account, of our sites and applications, such as the content you view or post, how often you use our Services, and your preferences.
- Usage, viewing, technical, and device data when you visit our Sites, use our applications on third-party sites or platforms, or open emails We send, including your browser or device type, unique device identifier, and IP address.
- Any miscellaneous data provided by a fundraiser, including professional or employment related data, public gender reveal, photo, video, etc.²⁰

"Personal data" is a very broad concept as personal data is not only any information relating to an *identified person* such as name, but also information relating to an *identifiable person* according to Article 4(1) GDPR. This means that data like an email address, a phone number, banking information, government ID or an IP address, that Indiegogo according to its Privacy Policy may inquire from the fundraiser, also falls within the material scope of GDPR, if this data alone or *combined* with other data can be ascribed to a natural person.²¹ However, not every kind of data is "personal data" that falls within the material scope of GDPR according to Article 2(1) GDPR, and thereby the rules on third country transfers. For instance, data regarding a legal entity, more specifically the company itself (company name, CVR number, contact information etc.), is not "personal data".²² On the other hand, the rules apply to all personal

²⁰ Indiegogo, Inc., 'Privacy Policy' (Effective December 20, 2021) <<https://indiegogo.trsnd.co/policies>> accessed 26 June 2022.

²¹ REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, preamble 26, 30.

²² REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to

data relating to natural persons in the course of a professional activity, such as the employees of a company/organisation, business email addresses that reveals the identity of a natural person or employees' phone numbers. Moreover, information in relation to one-person companies may constitute personal data where it allows the identification of a natural person. This fact is important to stress in a crowdfunding context, as many of the fundraisers are entrepreneurs launching their first company.

When the above-mentioned "personal data" is identified, the fundraiser must identify the transfer tools to rely on when transferring personal data to Indiegogo according to chapter V of the GDPR. These transfer tools aim to ensure that the level of protection of natural persons guaranteed by the GDPR is not undermined when transferring personal data out of the EU to a third country like the USA.²³

Article 45 GDPR provides for the transfer of personal data to a third country, which pursuant to a Commission decision, provides an "adequate level of protection", also known as a secure third country. The USA is not a safe third country, and for now, in case of third country transfers to Indiegogo Article 45 GDPR cannot be used as a basis for the transfer. GDPR art. 46, however, contains several additional transfer bases that can be used when transferring personal data to an insecure third country such as the United States. For private companies like fundraisers transferring personal data to another private company like Indiegogo, the following transfer bases are currently available:²⁴

- "Binding corporate rules" pursuant to Article 46(2)(b) and 47 GDPR
- Standard contractual clauses adopted by the European Commission pursuant to Article 46(2)(c) GDPR.
- Contractual clauses entered into between the fundraiser and Indiegogo on an ad hoc basis pursuant to Article 46(3)(a).

In situations where neither Article 45 nor 46 GDPR can be used as a tool for transfer, a third country transfer can also be carried out on the basis of the exceptions in Article 49 GDPR. However, the exceptions

the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, preamble 14.

²³ European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 11-13 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June 2022.

²⁴ Datatilsynet, 'Overførsel af personoplysninger til tredjelande' [2022] 4th edition, page 16. <<https://www.datatilsynet.dk/Media/637902777513932912/Vejledning%20om%20overf%C3%B8rsel%20til%20tredjelande.pdf>> accessed 26 June 2022

must be interpreted restrictively and relate mainly to processing activities that are occasional and not characterised by repetition²⁵. As crowdfunding for goods production includes *development* of the potential up-coming product, the fundraiser may transfer personal data to Indiegogo on an ongoing basis. For this reason, the fundraiser may not rely on the exceptions in Article 49 GDPR.

In consequence, it may only be the binding corporate rules, standard contractual clauses and ad hoc-contractual clauses that are available as transfer tools. However, binding corporate rules are primarily intended for major concerns and may be resource demanding to compose. Also, the ad hoc-contractual clauses are resource demanding to compose. Moreover, the corporate rules and ad hoc-contractual clauses must be approved by the national data protection authority and the European Data Protection Board (EDPB).²⁶ Therefore, in practice, the most relevant transfer tool for the fundraiser is the standard contractual clauses adopted by the European Commission pursuant to Article 46(2)(c) GDPR.

4. THE FUNDRAISERS USE OF STANDARD CONTRACTUAL CLAUSES

In a legal context, the standard contractual provisions form an annex to a decision adopted by the Commission, and the Standard contractual clauses can be found on the European Commission's website.²⁷ The standard contractual clauses enjoin the fundraiser and Indiegogo a range of liabilities, which, in overall, correspond to the liabilities in the GDPR.²⁸ The standard contractual clauses combine general clauses with a modular approach to cater for various transfer scenarios. In addition to the general clauses, the parties should only select the module applicable to their situation²⁹. As both the fundraiser and Indiegogo are data controllers, they

²⁵ Henrik Udsen, *IT-ret* (4th edition, Ex Tuto Publishing A/S, 2019) 448; European Data Protection Board, 'Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679' [2018] page 4 f. <https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf> accessed 26 June 2022.

²⁶ Datatilsynet, 'Overførsel af personoplysninger til tredjelande' [2022] 4th edition, page 16.

<<https://www.datatilsynet.dk/Media/637902777513932912/Vejledning%20om%20overf%C3%B8rsel%20til%20tredjelande.pdf>> accessed 26 June 2022.

²⁷ European Commission, 'Standard contractual clauses for international transfers' (4 June 2021) <https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc/standard-contractual-clauses-international-transfers_en> accessed 26 June 2022

²⁸ Henrik Udsen, *IT-ret* (4th edition, Ex Tuto Publishing A/S, 2019) 439 ff.

²⁹ COMMISSION IMPLEMENTING DECISION (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council [2021] OJ L199/31, preamble 10.

should select the module 1-clauses, which apply to controller-to-controller transfers.

Indiegogo's Terms of Use underlines that especially the standard contractual clauses form an important transfer tool when the fundraiser transfers personal data to Indiegogo. According to the Terms of Use, the fundraiser is entitled to ensure compliance with the European data controller obligations under applicable European data protection law, including the current standard contractual clauses.³⁰ Moreover, Indiegogo has published the relevant standard contractual clauses on its own website, more specifically the standard contractual clauses applicable for transfers from one data controller to another. However, in the pre-filled annexes of the standard contractual clauses, Indiegogo presupposes that the standard contractual clauses applies when Indiegogo *itself* transfers personal data about a contributor/backer to a campaign owner/fundraiser.³¹ Therefore, when transferring personal data to Indiegogo, the fundraiser must take initiative to enter the standard contractual clauses with Indiegogo and to make sure to adapt the annexes so that they reflect the specific transfers from the fundraiser to Indiegogo in question.

However, even though the fundraiser may manage to enter the standard contractual clauses with Indiegogo, the fundraiser cannot use the standard contractual clauses uncritically without any further considerations, even though that the standard contractual clauses are accepted as a valid starting point for transfer of personal data to unsafe third country.

5. ANOTHER LAYER OF SECURITY - TRANSFER IMPACT ASSESSMENT (TIA)

In the Schrems II-judgment, the CJEU thus stated that the use of the standard contractual clauses implies that the European data controller must verify, *on a case-by-case* basis, whether the law of the third country ensures adequate protection "*essentially equivalent*" to that guaranteed by EU law, specified GDPR as interpreted in the light of the fundamental rights guaranteed by the Charter.³² This assessment can be called a "TIA" ("transfer impact assessment").

The CJEU's requirement for a TIA originates from Article 44 GDPR, which sets out that a third country data transfer must have legal basis in chapter V of the GPDR Regulation, *but also* the additional rules in GDPR. One of these additional rules includes Article 5(2) GDPR

³⁰ Indiegogo, Inc., 'Terms of Use' (Effective December 20, 2021) <<https://www.indiegogo.com/about/terms>> accessed 26 June 2022.

³¹ Indiegogo, Inc., Standard Contractual Clauses for Campaign Owners (Effective December 20, 2021) <<https://indiegogo.trsnd.co/policies?name=standard-contractual-clauses-for-campaign-owners#european-commission-standard-contractual-clauses>> accessed 26 June 2022.

³² Case C-311/18 *Facebook Ireland and Schrems* [2020], paras 105 and 134.

regarding the "accountability" principle, stating that the data controller is responsible for compliance with GDPR, but also that the controller must be able to *demonstrate* this compliance. By conducting a TIA, the fundraiser may demonstrate how it will ensure adequate protection when transferring personal data to a third country by transferring personal data to Indiegogo.

When the fundraiser wants to transfer personal data to the US based Indiegogo, the fundraiser must, as part of its TIA, consider paragraph 168 to 202 in the Schrems II-Judgment. In these paragraphs, the CJEU took into account the fundamental rights of the Charter.³³ Pursuant to Article 6(1) of the TEU (Treaty on European Union), the Charter applies at treaty-level in EU law.³⁴ The Charter codifies several fundamental rights.³⁵ According to the preamble 4 of the GDPR, the GDPR respects all fundamental rights and observes the freedoms and principles recognised in the Charter. Therefore, the Charter must be taken into account in the interpretation of the GDPR, and the CJEU ascribe great importance to the Charter when ruling on questions relation to data protection law.³⁶

In the Schrems II-Judgment, the CJEU compared American national security legislating authorising mass surveillance of non-US citizens with Article 7, 8, 47 and 52(1) of the Charter.³⁷ Article 7 states the right to respect for private and family life. Article 8 determines the right to protection of personal data. Article 47 the right to an effective remedy and to a fair trial. Article 52(1) determines that any limitation on the exercise of the rights recognized by the Charter must be provided for by law and that any limitation may be made only if they are necessary and genuinely meet objectives of general interest etc. (proportionality).

In the Schrems II-judgment, the CJEU held, among other things, that the US security legislation in the Foreign Intelligence Surveillance Act (hereafter "FISA") Section 702, Executive Order 12333 and Presidential Policy Directive 28, does not lay down limitations of the US intelligence services' collection of personal data on non-US citizens.³⁸

Consequently, the fundraiser transferring personal data to Indiegogo is facing a legal barrier arising from a conflict between US security legislation and the fundamental rights of the EU Charter of Fundamental Rights.³⁹ This conflict applies although the fundraiser has entered standard

³³ Case C-311/18 *Facebook Ireland and Schrems* [2020], paras 168-202.

³⁴ Jonas Christoffersen and others, *EU's Charter om Grundlæggende Rettigheder med kommentarer* (2nd edition, Jurist- og Økonomforbundets Forlag, 2018) 40.

³⁵ Christina D. Tvarnø and Ruth Nielsen, *Retskilder og retsteorier* (5th edition, Jurist- og Økonomforbundets Forlag, 2017) 102.

³⁶ Peter Blume, *Databeskyttelsesret* (5th edition, Jurist- og Økonomforbundets Forlag, 2018) 60.

³⁷ Case C-311/18 *Facebook Ireland and Schrems* [2020], paras 168-202.

³⁸ Case C-311/18 *Facebook Ireland and Schrems* [2020], paras 168-202.

³⁹ Nicolai Kjærgaard Sørensen, 'Overførsel af personoplysninger til USA og Europa-Kommissionens standardkon-traktbestemmelser i lyset af EU-retten og grundlæggende rettigheder' (2021), page 31-33

contractual clauses with Indiegogo, as those clauses are not legally binding for authorities in third countries.⁴⁰ Therefore, transfer of personal data to the US on the basis of standard contractual clauses shows a clash between the legislative framework, more specifically EU law and US security legislation, and the contractual framework, namely the standard contractual clauses entered into between the fundraiser and Indiegogo.

As the standard contractual clauses in force were adopted by the European Commission in the wake of the Schrems II-judgment, the standard contractual clauses contain several provisions addressing this issue. For instance, clause 14 - regarding local laws and practices affecting compliance with the standard contractual clauses - requires the data exporter (the fundraiser) and the data importer (Indiegogo) to

"[...] warrant that they have no reason to believe that the laws and practices in the third country of destination applicable to the processing of the personal data by the data importer, including any requirements to disclose personal data or measures authorising access by public authorities, prevent the data importer from fulfilling its obligations under these Clauses."⁴¹

Moreover, clause 14 states that the parties, in providing the above-mentioned warranty, have taken due account to a number of elements, including the laws and practices of the third country of destination.⁴² In other words, the parties shall - in accordance with the Schrems II-judgment - conduct a TIA.

Also Indiegogo's Terms of Use seems to reflect the Schrems II-judgment. Here, Indiegogo underlines that the fundraiser as a data controller under applicable EU law must ensure transfers and conduct any required data protection impact assessments (TIA).⁴³

<<https://projekter.aau.dk/projekter/files/415520765/Specialet.pdf>> accessed 26 June 2022.

⁴⁰ Case C-311/18 *Facebook Ireland and Schrems* [2020], paras 125 and 132.

⁴¹ ANNEX to the COMMISSION IMPLEMENTING DECISION on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council [2021] C(2021) 3972 final, Clause 14.

⁴² ANNEX to the COMMISSION IMPLEMENTING DECISION on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council [2021] C(2021) 3972 final, Clause 14.

⁴³ Indiegogo, Inc., 'Terms of Use' (Effective December 20, 2021) <<https://www.indiegogo.com/about/terms>> accessed 26 June 2022.

6. INDIEGOGO TERMS OF USE AND TIA IN VIEW OF EDPB RECOMMENDATIONS

In the Schrems II Judgment, the CJEU did not make any clear definition of the factors that may be included as part of the data controller's TIA. Therefore, when conducting the TIA, further guidance is required. In this context European Data Protection Board EDPB is central. Pursuant to Article 70(1) GDPR, EDPB shall ensure the consistent application of GDPR, and for the purpose of this, EDPB can issue guidelines and recommendations.

In the wake of the Schrems II Judgment, EDPB issued Recommendations 01/2020 (Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data)⁴⁴, that among other things aims to help data exporters (entities transferring data to third countries) with the conduct of the TIA. It is important to note that the recommendations are not legally binding according to Article 288, last sentence of the TFEU (Treaty on the Functioning of the European Union).⁴⁵ However, according to Article 68(3) GDPR, EDPB - among other things - consists of the head of the data protection authorities from each Member State. Therefore, it must be expected that each data protection authority supervises in accordance with the recommendations, which is why the recommendations is of great practical significance.⁴⁶

The recommendations underline that the TIA first and foremost must be based on legislation publicly available.⁴⁷ Consequently, when the fundraiser transfers personal data to Indiegogo in the USA, the fundraiser should consider whether the personal data transferred may be subject to the US security legislation that the CJEU deemed to be contrary to the data protection afforded by EU law.

⁴⁴ European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 9, 11-13 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June 2022.

⁴⁵ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/49, 288.

⁴⁶ Peter Blume, *Persondatarettens kilder og metode* (1st edition, Djøf Forlag, 2020) 48 f. and 64; Udsen, Henrik Udsen, *IT-ret* (4th edition, Ex Tuto Publishing A/S, 2019) 457 and 473.

⁴⁷ European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 17 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June 2022.

Regarding FISA Section 702, this legislation authorizes collection of "foreign intelligence information"⁴⁸. This definition is very broad as it does not only include information that is necessary in the interest of national security, but any information from a foreign power or territory that is merely related to the conduct of foreign affairs⁴⁹. Therefore, if the fundraiser is based in the EU, the personal data transferred may be "foreign intelligence information", even though that the data is transferred as part of a crowdfunding purpose. However, pursuant to FISA Section 702, the American authorities may only collect personal data from "electronic communications service providers"⁵⁰. However, this definition may include any company that gives others, including the company's own employees, access to communicate electronically via, for example, e-mail. This regardless of what else might be the company's primary business area.⁵¹ Therefore, Indiegogo may also fall within this definition.

Regarding E.O. 12333, this legislation authorises the intelligence services to collect and store data before it reaches the US and there is subject to the provisions of FISA. The surveillance activities based on E.O. 12333 are thus not regulated by law, and therefore the fundraiser cannot give any formal guarantee that personal data transferred to Indiegogo will not be subject to surveillance under E.O. 12333.⁵²

The assessment above reveals that the personal data transferred to Indiegogo might be subject to surveillance that is contrary to the data protection afforded by EU law, as the American legislation gives wide authority for surveillance. However, it is unsure whether the personal data transferred to Indiegogo falls within the practical scope of the American application of FISA Section 702 and E.O. 12333. In this situation, the American legislation is - according to the Recommendations 01/2020 - "problematic legislation".⁵³

As it also appears from Recommendations 01/2020, it should be noted that it is not only the US security legislation itself that the fundraiser needs to take into account when conducting the TIA. For instance, the fundraiser should also take into consideration all the actors participating

⁴⁸ 50 U.S.C. § 1881a(h)(2)(A)(v) (2018).

⁴⁹ 50 U.S.C. § 1801(e)(2)(B) (2018).

⁵⁰ 50 U.S.C. § 1881a(h)(2)(A)(vi) (2018).

⁵¹ H. Marshall Jarrett and Michael W. Bailie, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (Office of Legal Education, Executive Office for United States Attorneys) 117 <<https://www.justice.gov/file/442111/download>> accessed 26 June 2022.

⁵² Case C-311/18 *Facebook Ireland and Schrems* [2020], para 63.

⁵³ European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 17-18 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June 2022.

in the transfer, including other data controllers, and any envisaged onward transfer from Indiegogo to another company.⁵⁴ In a crowdfunding context this could be a third-party transfer manager who may need personal data from the fundraiser transferred to Indiegogo for financial compliance purposes etc.⁵⁵

Such onward transfers might undermine the protection afforded by the standard contractual clauses, as the third-party transfer manager not just like that is bound by the standard contractual clauses entered into between the fundraiser and Indiegogo. However, the standard contractual clauses address this issue, as it appears from clause 8 that the data importer, Indiegogo, shall not disclose the personal data to a third party located outside the EU, for instance a third-party transfer manager located in the US or another third country, unless this third party is or agrees to be bound by the standard contractual clauses which the fundraiser and Indiegogo have adopted. Otherwise, Indiegogo may only transfer the personal data to the third-party transfer manager under certain particulars, for instance if the third-party transfer manager is located in a safe third country according to Article 45 GDPR.⁵⁶

7. CROWDFUNDING AND SUPPLEMENTARY MEASURES - ENCRYPTED DATA – LIKELY TO WORK ?

If the fundraiser's TIA shows that the standard contractual clauses does not ensure a protection essentially equivalent to that guaranteed by EU law due to "problematic legislation", according to the Schrems II judgment the fundraiser may provide "supplementary measures" to those offered by the standard contractual clauses⁵⁷. As the ECJ in the Schrems II judgment did not define the supplementary measures and what those measures could consist of, also in this connection is Recommendations 01/2020 very useful, as the recommendations also aims to help with the identification of appropriate "supplementary measures". According to the recommendations, there will be situations where only appropriately implemented "technical measures" might impede or render ineffective access by public authorities in third countries to personal data, for

⁵⁴ European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 15, 22 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June.

⁵⁵ Indiegogo, Inc., 'Privacy Policy' (Effective December 20, 2021) <<https://indiegogo.trsnd.co/policies>> accessed 26 June 2022.

⁵⁶ ANNEX to the COMMISSION IMPLEMENTING DECISION on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council [2021] C(2021) 3972 final, Clause 8.

⁵⁷ Case C-311/18 *Facebook Ireland and Schrems* [2020], para 133.

surveillance purposes. Such technical measure could be encryption of the data transferred to the third country which exclude access to the data transferred.⁵⁸ In the Indiegogo Privacy Policy, Indiegogo appears to know that technical measures should be taken into consideration:

"HOW WE PROTECT YOUR INFORMATION AND
DATA RENTENTION

[...] We have implemented technical, administrative, and physical security measures that are designed to protect User information from unauthorized access, disclosure, use, and modification. We regularly review our security procedures to consider appropriate new technology and methods. However, please be aware that despite our best efforts, no security measures are perfect or impenetrable."⁵⁹

Indeed, no security measures are perfect or impenetrable, and in its Privacy Policy, Indiegogo does not mention anything about encryption of data before it is transferred to Indiegogo. This may be for good reasons: If the fundraiser encrypts the personal data before transferring the data to Indiegogo, this will prevent the entire purpose of the transfer as Indiegogo may only store the data but cannot access the data in the clear.

Regardless of this fact, in the annex 2 of the Recommendations 01/2020, EDPB states that transfer of personal data for business purposes where the data importer (in this case Indiegogo) needs access to data transferred, and the data importer is located in a third country where the public authorities are granted a disproportionate access to the data the EDPB is incapable of envisioning an effective technical measure to prevent that access from infringing on the data subject's fundamental rights.⁶⁰ This applies even though Indiegogo encrypts the data after having received the personal data from the fundraiser, as Indiegogo according to

⁵⁸ European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 21-23 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June 2022.

⁵⁹ Indiegogo, Inc., 'Privacy Policy' (Effective December 20, 2021) <<https://indiegogo.trsnd.co/policies>> accessed 26 June 2022.

⁶⁰ European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 34 and 35 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June 2022.

FISA section 702 may also be obligated to hand over encryption keys to US intelligence agencies.⁶¹

However, according to the Recommendations 01/2020, the fundraiser has a last option, as it can decide to proceed with the transfer without being required to implement supplementary measures, if the fundraiser considers that it has no reason to believe that the American "problematic legislation" will be applied, in practice, to the transferred data and/or Indiegogo.⁶² It is important to stress that this is not a risk-based assessment, and the fundraiser cannot take into consideration the *likelihood* of American surveillance of the transferred data in question.

This must be seen in the context of the fact that the requirement for a legal ground for transfers in chapter V of the GDPR Regulation is binary: Either the fundraiser has a legal ground or not. This is reflected in the Recommendations 01/2020, as the fundraiser according to EDPB needs to demonstrate the practical application of the American legislation with a "detailed report" based on "*relevant*", "*objective*", "*reliable*", "*verifiable*" and "*publicly available or otherwise accessible*" information.⁶³

8. IN SEARCH OF VALID MEANS FOR TRANSFER OF PERSONAL DATA TO INDIEGOGO

In Annex 3 of the Recommendations, EDPB mentions examples of sources where the information could be obtained from, for instance relevant case-law, resolutions and reports from intergovernmental organization, reports, and analysis from competent regulatory networks etc. Moreover, the fundraiser can take into consideration whether Indiegogo can confirm that it has not received requests for access to data

⁶¹ 50 U.S.C. § 1881a(a),(i)(1) (2018); European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 29 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June 2022.

⁶² European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 18 and 19 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June 2022.

⁶³ European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 19 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June 2022.

from U.S. public authorities in the past and that it is not prohibited from providing information about such requests or their absence.⁶⁴

Taking into consideration Indiegogo's comprehensive Privacy Policy, nothing indicates that Indiegogo is in possession of the above-mentioned requested information. Quite the reverse, as Indiegogo seems to acknowledge that US national security law affects the possibility of compliance with EU law:

"We may share the categories of information identified above for the following business and commercial purposes:
[...]

6. When we share your personal information with third parties [...] to comply with legal process (including to comply with national security or law enforcement requirements) [...]."⁶⁵

However, because of the fundraiser's customer relation to Indiegogo, the fundraiser may - particularly if this is done in cooperation with other fundraisers - be able to ask Indiegogo for the above-mentioned relevant information so that the transfer maybe can take place in accordance with EU law. As it appears from Recommendations 01/2020, the data exporter and data importer need to cooperate to make the assessment, even though, when all come to all, it is the data exporter's, the fundraisers, responsibility that the transfer from the EU to the US takes place in accordance with EU law.⁶⁶ However, as it appears from the above-mentioned presentation, a TIA is a piece of hack work. Conduction a TIA requires resources and time - which is something that a fundraiser may not have, especially not in the start-up phase.

⁶⁴ European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 47 and 48 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June 2022.

⁶⁵ Indiegogo, Inc., 'Privacy Policy' (Effective December 20, 2021) <<https://indiegogo.trsnd.co/policies>> accessed 26 June 2022.

⁶⁶ European Data Protection Board, 'Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' [2021] Version 2.0, page 18 <https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf> accessed 26 June 2022.

9. THE WAY AHEAD FOR THE FUNDRAISER'S TRANSFER OF PERSONAL DATA TO THE US

The current European legal framework for transfer of personal data to third countries is made to ensure an adequate level of protection of the personal data transferred from the EU.

The analyses above reveal that fundraising campaigns involve supply of personal data from fundraiser (and backer) to crowdfunding service provider in the different steps of a crowdfunding campaign. As shown above such exchange of data is however hardly manageable in context of the strict rules of the GDPR and the Charter when the crowdfunding platform is based in the US.

The American intelligence and surveillance laws and possible US government access to EU citizens personal data have established barriers to transfer of personal data from the EU to the US in many different data exchange contexts. This has left European and US companies with cross border transfers problems that can only be solved at interstate level.

Solutions have been discussed between the European Commission and the US, and on 25 March 2022, the European Commission, and the U.S Government announced that they had agreed *in principle* on a new so-called "Trans-Atlantic Data Privacy (TADP) Framework". Currently, the U.S Government and the European Commission are cooperating with a view to translate the framework into legal document that will need to be adopted by both the EU and the US to put the new TADP Framework in place.⁶⁷ Therefore, European companies cannot rely on the statement from the European Commission and the US yet.

Reportedly, under the new framework the US is to put in place new safeguards to ensure that US surveillance activities are necessary and proportionate etc., and the US intelligence agencies is to adopt procedures to ensure effective oversight of the coming new privacy standard.⁶⁸

On 7 October 2022, President Biden signed the "*Executive Order on Enhancing Safeguards for United States Signals Intelligence Activities*". According to the White House, the executive order among other things "*adds further safeguards for U.S. signals intelligence activities, including requiring that such activities [are] conducted only in pursuit of defined national security objectives*" and only when the intelligence activities are "*necessary*" and "*proportionate*". Moreover, a new "*multi-layer mechanism*" is intended to be established for individuals to obtain "*independent and binding review and redress of claims*" that personal data

⁶⁷ European Commission, 'European Commission and United States Joint Statement on Trans-Atlantic Data Privacy Framework' (25 March 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2087> accessed 26 June 2022

⁶⁸ European Commission, 'European Commission and United States Joint Statement on Trans-Atlantic Data Privacy Framework' (25 March 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2087> accessed 26 June 2022

collected through US intelligence services was collected or handled illegally. An appeal body, "*the Civil Liberties Protection Officer*", will conduct an initial investigation of qualifying complaints received, and a new "*Data Protection Review Court*" is to "*provide independent and binding review*" of the Civil Liberties Protection Officer's decisions.⁶⁹

What from fundraisers' perspective is important is to be ensured that well-functioning, valid and reliable settings are established on both US and European side to be able to do everyday business: Transferring of personal data to the US. However, some further political, legal and juridical steps have to be taken and the European business sector still needs to have patience.

Now, the European Commission has to determine whether the new executive order provides an "*adequate level of protection*" and, if so, draft an "adequacy decision" under Article GDPR 45 stating that the TADP. It should be noticed that the organization "NOYB", founded by Max Schrems who filed the claim leading to the Schrems II-judgment, as a "first reaction" to the new executive order has stated that the executive order is "*unlikely to satisfy EU*". Despite that the new executive order uses words as "*necessary*" and "*proportionate*", NOYB does not think that there is any indication that the US mass surveillance will change in practice, as the EU and US have different understandings of these words. Moreover, according to NOYB the new "*Court*" mentioned in the executive order will not be a court in the normal legal meaning of Article 47 of the Charter or the US Constitution, but a "*body within the US government's executive branch*."⁷⁰

Until a new framework for transfer of personal data from Europe to the US has been established, European fundraisers transferring personal data to crowdfunding platforms located in the US are advised to conduct a TIA as good as possible and in compliance with Recommendation 01/2020 in order to demonstrate "accountability" pursuant to Article 5(2) GDPR. If the TIA shows that the fundraiser cannot ensure an adequate protection of the personal data transferred, it must consider using a European based crowdfunding platform instead.

⁶⁹ The White House, 'FACT SHEET: President Biden Signs Executive Order to Implement the European Union-U.S. Data Privacy Framework' (7 October 2022) <<https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/07/fact-sheet-president-biden-signs-executive-order-to-implement-the-european-union-u-s-data-privacy-framework/>> accessed 30 October 2022.

⁷⁰ NOYB, 'First reaction: Executive Order on US Surveillance unlikely to satisfy EU law' (7 October 2022) <<https://noyb.eu/en/new-us-executive-order-unlikely-satisfy-eu-law>> accessed 30 October 2022.