GESTE comments on the EDPB "Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data"

This contribution emerges from the discussions and collective work carried out within the framework of the working groups organized by GESTE regarding the present recommendations and does not commit the members of GESTE individually and cannot be considered exhaustive.

GESTE brings together leading online French professional publishers (media, video, musi c, games and classifieds). They converge towards a common goal: establish a sustainable and fair ecosystem. Attentive to market developments and expectations of content publishers and online services, GESTE organizes pragmatic and innovative recommendations related to the development of economic models, editorial innovation, new tools & technology, legal and regulatory developments. Over one hundred GESTE members are actively involved in the development of online publishing economic, legislative and competitive landscapes.

I - Moratorium for compliance to Schrems II ruling and new recommendations

The absence of a grace period is very detrimental to companies, particularly VSEs and SMEs, and does not take into account the economic, operational and legal realities of normal business relationship. In the current context, any company can potentially be sanctioned for non-compliant transfers to the United States, which is the case, to date, of almost all European exporters.

This moratorium should run for a period of one year from the publication by local DPAs of compliance details and operational guidelines. Indeed, in order to be able to comply with the new rules, companies imperatively need this legal certainty for a period of time appropriate to the complexity of the situation.

So, during this defined period of time, the local DPAs should, in the course of their controls, assist companies in their compliance and, except in the case of major breaches, should not sanction them on this basis.

II - Observations regarding the Step 3: « Assess whether the Article 46 GDPR transfer tool you are relying on is effective in light of all circumstances of the transfer »

This provision could create a significant divide between firms that can afford to conduct such assessments and those that cannot (especially SMEs and VSEs). Indeed, a study as complete as the one recommended by the EDPB turns out to be very expensive, and is not affordable for all companies, especially since this study must be constantly updated.

Therefore, for more efficiency, this study should not be conducted at the individual company level, but by an independent third party, which could be a local DPA or any other designated legitimate body.

This designated third party would be responsible (for the principal countries that are not covered by an adequacy decision) for listing all legal aspects that cannot be considered essentially equivalent to the safeguards required under EU law so that each company can take informed compliance additional measures.

While this system does not provide complete legal certainty - in the same way that an adequacy decision is likely to be challenged by a data subject -, it does allow each company to compete on an equal footing in their compliance process within a unified and centralized framework.

Indeed, contrary to the first two steps contained in the EDPB 01/2020 recommendations, which are specific to each company, step 3 can be taken over by a local authority.

Thus, in the same way as the provision of a draft standard contractual clause, it would be a matter of helping the actors concerned through the pooling of information and efforts.

III - Pragmatic reassessment of the distribution of responsibilities

As specified by these recommendations and the CJEU « *It is the primary responsibility of exporters to ensure that the data transferred is afforded in the third country of a level of protection essentially equivalent to that guaranteed within the EU* »

However, these recommendations should take into account current market realities. Namely, many VSEs and SME's are using essential solutions for their business which are owned by key players with whom it is very difficult or impossible to conduct successful contract negotiations, most of them operating with standard form contracts.

The solution could not only reside in the termination of contractual relationships with these key players to the benefit of companies that do not export data outside the European Union. This could be very detrimental to innovation and it is not realistic in the current state of the market. Indeed, there is no systematic equivalence of commercial offers.

It is therefore necessary not only to review the division of responsibilities between exporter and importer (the responsibility for assessing the conformity of local law and the measures to be taken can’t only rest with the exporter) and to provide for exemptions from the exporter's liability in the event of a non-negotiable adhesion contract and the importer's non-compliance with signed contracts.