U.S. COMMENTS ON PROPOSED EDPB GUIDELINES 2/2020
(5 May 2020)

The United States respectfully submits these comments on the European Data Protection Board (EDPB) proposed Guidelines 2/2020, interpreting the requirements of General Data Protection Regulation (GDPR) articles 46(2)(a) and 46(3)(b) concerning requirements for international instruments or administrative arrangements governing transfers between European Union (EU) and non-EU public authorities. We are concerned that the proposed Guidelines set a number of requirements that are too limiting, and which would make the governmental cooperation that both the EU and third countries rely upon -- and particularly the detailed regulatory cooperation they need -- difficult to sustain. We hope that our comments (which we could expand with more illustrative detail after the current public health crisis has abated) will serve as a basis for a further constructive dialogue on these important matters.

I. The provisions to be included in international instruments and administrative arrangements must be viewed in relation to the availability of article 49 derogations: Particularly if derogations are to be interpreted in a restrictive manner, the Guidelines must provide sufficient flexibility to allow the successful conclusion of international cooperation instruments and arrangements that ensure needed cooperation.

Proposed Guidelines 2/2020 can affect the extent to which authorities in EU Member States transfer personal data to governments around the world in order to protect the public. Such data is already exchanged on a daily basis worldwide for a broad range of critical regulatory purposes; for example to: 1) trace contagious diseases and help ensure that medicines are properly supported by clinical trials; 2) ensure that consumer products meet required safety standards; 3) supervise financial market participants and maintain the stability of global financial markets; 4) regulate professions and businesses; 5) protect individuals from fraud and abusive or deceptive practices; 6) facilitate enforcement of competition laws; and 7) facilitate enforcement of laws protecting privacy. In addition, intergovernmental transfers facilitate fair and predictable adjudication of public, private and commercial disputes. Without such cooperation, we deprive our societies of rapid and expert governmental intervention needed to safeguard the well-being of individuals and the public at large.

The GDPR provisions generally available to facilitate transfers between EU Member State authorities and those in third countries are Articles 45 (adequacy decisions), 46 (appropriate safeguards) and 49 (derogations). In some situations, cooperation may be carried out pursuant to a Commission decision that a third country or territory, or sector thereof, ensures an adequate level of protection. With most countries, however, Articles 46 or 49 are the most likely bases upon which EU authorities can transfer such data to third country counterparts. As a practical matter, the effects of an interpretation of either Articles 46 or 49 must be gauged with respect to the interpretation of the other. If Article 49 is interpreted in a manner that makes it unavailable in practice as a legal basis for most transfers, then an instrument or arrangement will be needed instead. Under such an interpretation of the two articles, it is even more necessary that the contents of the instrument or arrangement meet the legal, practical, and policy exigencies of each Party. Otherwise, it may be impossible to agree upon a satisfactory instrument or arrangement, and cooperation will suffer.

In this regard, we note our concern with the statement in paragraph 7 of the proposed Guidelines that "the derogations provided by Article 49 GDPR must be interpreted restrictively and mainly relate to processing activities that are occasional and non-repetitive." While we understand that, as a policy matter, it may be considered preferable that Article 46 be invoked more often than Article 49, we do not believe the above restriction on invoking the derogations is supported by Article 49's text. Specifically, while the last paragraph of Article 49(1) contains the term "not repetitive", that term applies only to that paragraph, and not to the entirety of Article 49(1) (a) through (g).[1]

The sentence in which "not repetitive" appears provides a residual basis for transfer. Its text makes plain that this term only applies to transfers of data to a third country or international organization when "none of the derogations for a specific situation referred to in the first subparagraph of this paragraph is applicable" (referring to Article 49(1) (a) through (g)). If a derogation listed in Article 49(1)(a) through (g) applies, then the controller should not have to consider the criteria applicable to the residual basis.

The Board's interpretation instead gives two adjacent but mutually exclusive provisions the same limiting effect, notwithstanding the fact that the first provision lacks the key limiting term found in the second provision. This overly expansive interpretation also leads to practical difficulties, because the ensuing limitations do not leave sufficient room for authorities to engage in needed cooperation when a listed derogation applies but adequacy decisions or international agreements or administrative arrangements – all of which can take considerable time to negotiate to completion and implement – have not yet been put in place. We therefore invite the Board to review Guidelines 2/2018 (and any other Guidelines that refer to the interpretation therein) with a view to facilitating greater use of Article 49 consistent with its terms.

If Article 49 nevertheless continues to be interpreted as it is at present, it will require authorities to overwhelmingly rely on Article 46 international instruments and administrative arrangements. In that case, cooperation will also suffer if such instruments and arrangements cannot be concluded expeditiously because the contents considered essential by Guidelines 2/2020 are too stringent. The proposed Guidelines should provide significant flexibility in this regard, an issue discussed in the following section.

II. The Guidelines should be less prescriptive regarding the contents of international instruments and administrative arrangements, so as not to impose unduly strict requirements.

Paragraphs 12-72 of Guidelines 2/2020 contain elements the Board proposes be contained within Article 46 instruments and arrangements.[2] Some of the elements provide negotiators with

[1] We also do not believe that recital 111 is a sufficient basis for concluding that all Article 49 transfers must be "occasional," since that language in recital 111 appears in a sentence that applies only to specified Article 49 derogations. In any event, a recital should not be read to impose a restriction that the operative text of GDPR specifically does not impose. Nor does recital 112's discussion of public interest derogations support such a narrow reading.

[2] Initially, paragraph 5 of the Guidelines states that a legal basis for processing under GDPR Chapter 2 also would be required. Generally, the conclusion of an international instrument or administrative arrangement will arise where a public authority in the EU has seen the benefit of, and seeks to define a framework for, sharing and receiving data

sufficient flexibility to accommodate different national systems (see, e.g. paragraphs 12-15, 22, 44). In other cases, very specific requirements are imposed, without, in our view, sufficient justification in the language of the GDPR itself, or sufficiently taking into account the practical consequences. In addition to differences between third countries, even within a third country some authorities may be differently situated from others in terms of the types of data they process and the third country legal and policy requirements applicable to them. The fact that an Article 46 agreement or arrangement may be in place with a specific authority in that country does not necessarily indicate that the same framework will be viable for other authorities in that country. Consequently, specific, mandatory provisions should be based on only the strongest legal justification based on the GDPR's text. Moreover, any decision to make a provision mandatory should also take into account the extent to which doing so may make it unduly difficult, in the context of some foreign legal systems or policies, to meet such requirements.

For example, paragraphs 16-17 interpret restrictively the circumstances in which a receiving authority's use of personal data would be considered compatible with the purpose for which the data was initially processed. However, we are not aware of any specific provision in GDPR that requires such a restrictive interpretation. In addition, third countries may require greater flexibility for reasons that are compelling in light of their historical, legal and/or political conditions and governmental structure (e.g., federal states).

The proposed Guidelines also contain various notification, authorization, reporting and other requirements for third country authorities. See, for example, paragraphs 20 (notification requirements for inaccurate data); 23 (notification requirements in the event of a data breach); 29, 33 and 34 (notification requirements to individuals and timelines); 39-43 (notification and authorization requirements and restrictions for onward sharing); and 52-53 (notification requirements regarding review activities).

There are multiple difficulties that arise with respect to such requirements, the imposition of which would limit the ability of public authorities both within and outside the EU to achieve the public interest benefit of these mechanisms. At the outset, while GDPR may expressly require EU Member State authorities to carry out some of these measures, we are not aware that it specifically requires third country authorities to do so.[3] If that is the case, it is not clear why such measures should be considered mandatory as opposed to optional.

In addition, some of these proposed notification requirements, including what can be read as a requirement that third country authorities notify an individual each time his or her personal data is obtained or being processed in a particular manner (see e.g., paragraph 29), are measures

---

beneficial to its public interest mission. We propose adding that, in the context of such an instrument or arrangement between public authorities, a basis for processing under GDPR Articles 5, 6 and 9 would invariably exist, particularly those in 6(1)(e) and 9(2) (g)-(j), given that the instrument or arrangement is being entered into pursuant to the EU public authority's legal authority to conclude it, and the fact that processing under the terms thereof is beneficial to that authority in carrying out its legally authorized public interest functions.

[3] To our knowledge, the Court of Justice of the European Union (CJEU) has previously stated that a transfer to a third country requires an "essentially equivalent" protection of fundamental rights, rather than that a third country must apply the same standards that Member States are obligated to carry out under GDPR.

that may require third country legislative changes that would be difficult to attain. For example, such requirements may trigger a need to appropriate major additional financial resources (including for courts) to provide for sufficient staffing to carry out such far-reaching measures and respond to their consequences.[4] These types of requirements may be beyond the capability of third countries to implement. We have the same basic concern as to the feasibility of other notification requirements and timeframes proposed for inclusion in Guidelines 2/2020.

Similarly, with respect to rights of data subjects, and restrictions thereto, as referred to in paragraphs 26, 31-35, we believe the Guidelines should resolve the apparent conflict between the broader restrictions on such rights permitted under paragraphs 26 and the narrower restrictions permitted under paragraphs 29 and 35, so it is clear that all restrictions would be available, in a manner similar to that foreseen throughout GDPR Chapter 3, and in particular by Article 23. We also believe that the availability of derogations for archiving purposes in the public interest (in a manner like that provided for under GDPR Article 89) should be referenced here. In the United States, for example, domestic law requires government agencies to maintain in their entirety documents that reflect the operations of the government for specified periods of time, so deletion as described in paragraph 33 would not be feasible.

Accordingly, we invite the Board to review the proposed Guidelines with a view to either removing such requirements or making clear that they are optional. This will enable the negotiations to progress in a manner that facilitates the ability of the authorities to reach agreement on terms also workable for foreign partners. We do not believe that providing greater flexibility will result in instruments or arrangements that do not meet the requirements of EU law, since the terms of such agreements and arrangements are subject to various forms of review, including before courts, in the event that the provisions thereof are viewed by interested persons as being insufficient. To the contrary, providing greater flexibility at this stage will support the use of these safeguards for transfers between public authorities while enabling interpretations to be settled by the courts to a greater extent before strong conclusions are drawn.

* * *

In conclusion, we appreciate the opportunity to provide these general comments and our views regarding the manner in which Articles 46(2)(a) and 46(3)(b) should be interpreted in order to allow authorities in the EU to cooperate effectively with third country governments in their mutual public interests in the spirit of reciprocity for international cooperation. As we have offered in the past, we would welcome meeting with the Board to engage in a direct and more detailed dialogue on these matters, to provide further context and allay any concerns.

[4] We are aware that the CJEU has commented favorably on notification of individuals whose personal data is transferred. However, we do not believe the relevant opinion can be read to definitively require notification by third country authorities.