

POSITION PAPER



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

ESBG (European Savings and Retail Banking Group)

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The European Savings and Retail Banking Group (ESBG) and its members welcome the opportunity to contribute to the European Data Protection Board (EDPB) Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data.

We are sharing comments and questions about the recommendations mentioned above and we would like to take this opportunity to ask EDPB for further clarification and guidance about the following points of the text:

Regarding the point 13:

- ESBG would like EDPB to clarify if the potential remote access from a third country already counts as a “transfer”. For example:

Data Controller ABC makes use of the cloud computing services of Data Processor XYZ. XYZ is a multinational IT-company with group entities all over the globe. In its relationship with ABC, all personal data are exclusively stored and otherwise processed within the EU by XYZ’s EU-affiliates. This is guaranteed contractually. There is still, however, the technical possibility that XYZ’s admins located in third countries may gain access to ABC’s personal data.

- ESBG would like EDPB to clarify if in the example given above, the mere technical possibility of personal data being accessed from a third country trigger the applicability of the Chapter V of the GDPR.
- ESBG would like EDPB to clarify the applicability of the Chapter V of the GDPR in cases where all data processing activities physically take place in the EEA by data processors incorporated in the EEA, but third country authorities have the means to put pressure on the data processors’ parent company due to their being third country entities (e.g. US-CLOUD Act).
- ESBG would like EDPB to clarify if the act of putting a website containing contact details of employees (Contacts for Sales, Recruiting, name of Data Protection Officer, etc.) would be considered as a “transfer” of personal data to a third country, given that the website is accessible from all around the globe.
- ESBG would like EDPB to provide guidance on how to react if it is not the Data Controller who makes use of a third country service, but the data subject: i.e. the data subject (customer) himself sends a message via a mail service provider that is located in a third country, or sends an invitation via an online conference provider that is located in a third country. In the message or during the online conference, personal data relating to the data subject (customer) will be exchanged.
 - Would the Data Controller be compelled to propose a different means of communications or may the Data Controller rely on the data subject’s choice?

Regarding the point 42:

- ESBG would like EDPB to clarify what “lacking” refers to in the second sentence:
 - Would it be considered a lack of publicly available legislation (i.e. there is no publicly accessible register of all laws), or a lack of legislation that effectively ensures that the

transferred personal data is afforded a level of protection in the third country that is essentially equivalent to that guaranteed within the EEA?

Regarding the point 45:

- The wording of Point 45 could give the impression that the assessment of the third country's legal system (Step 3) has to be conducted in any case, and only if the outcome of the assessment shows that the third country lacks European standards, data exporters should proceed to Step 4.
- In case that strong technical measures, that hinder the data importer as well as any third country authorities to (mis-)use the personal data, are implemented from the beginning (e.g. the measures described in Use Case 2 on page 23), could EDPB clarify if there would be the need for a prior assessment as described in Step 3?

Regarding the point 48:

- EDPB states that contractual and organizational supplementary measures alone will “*generally*” not be sufficient. This indicates that they may be sufficient in specific cases. ESBG would like EDPB to provide examples or use cases where this may be the case.

Regarding the point 49:

- ESBG would like EDPB to explain how the factors should be taken into consideration, especially in regards of the “nature of the data”. For example: If the personal data solely comprises the names, job titles, and business contacts of employees (i.e. “low risk” data that is always available upon request to outside parties), all of them being necessary for creating accounts with a cloud computing service provider located in a third country, and the data processed *within* the cloud does not relate to natural persons – would mere contractual supplementary measures be sufficient?

Other comments:

- The European Commission has proposed a new set of Standard Contractual Clauses (SCC).
 - Could the use of these new SCC alone or in connection with contractual supplementary measures be the basis for proving adequacy of data protection level in the use cases where technical supplementary measures will not work in practice?
- The assessment of a third country's legal system may lead to different results based on interpretations because of subjectivity and personal expertise (or access to means relevant for the check).
 - ESBG would appreciate guidance from EDPB providing a general due diligence of third countries legal systems as a baseline for the check of a data controller in Europe regarding the specific transfer. For instance: a map showing the results based on a traffic light system.



About ESBG (European Savings and Retail Banking Group)

ESBG represents the locally focused European banking sector, helping savings and retail banks in 21 European countries strengthen their unique approach that focuses on providing service to local communities and boosting SMEs. An advocate for a proportionate approach to banking rules, ESBG unites at EU level some 900 banks, which together employ more than 650,000 people driven to innovate at roughly 50,000 outlets. ESBG members have total assets of €5.3 trillion, provide €1 trillion in corporate loans (including to SMEs), and serve 150 million Europeans seeking retail banking services. ESBG members are committed to further unleash the promise of sustainable, responsible 21st century banking.

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