

Date: 17 12 2020
EU Transparency Register No. 5149794935-37

FRENCH INSURANCE FEDERATION'S RESPONSE TO EDPB'S CONSULTATION ON RECOMMENDATIONS 01/2020

The French Insurance Federation (FFA) understands the objectives of preserving the sovereignty of the EU and in particular the attention to the respect of the GDPR for the protection of privacy. FFA would like to provide the following response to these objectives, in recognition of the concerns of insurers.

On a preliminary basis, French insurers would like to share general comments on the consequences of Schrems II decision:

- The important interpenetration of the EU and US digital economies must be taken into account. Businesses, for example, commonly use cloud services while a large proportion of providers are from non-EU players. The localisation of servers in the EU does not prevent data transfers towards third countries. Maintenance services for many essential IT tools, both hardware and software, usually have several levels of intervention, some of which, the most critical, are carried out from the United States.
- These numerous data exchanges make the rapid adoption of an alternative to the Privacy Shield essential. Most European economic players already use available compliance tools. It is however up to the Commission and the US authorities to agree on a relevant data exchange framework that would be consistent with the GDPR. Without this framework, the effectiveness of the current tools (standard contractual clauses and binding intra-group rules) and the full analysis of legal and political foreign systems cannot rely on European economic actors without pricing these industries out the global market. It is, therefore, the responsibility of the European Commission to assess the adequacy of the level of data protection for a jurisdiction.
- The solution to the problem highlighted by the Schrems II ruling lies in the establishment of an international framework and, then, in the use of the latter by economic actors. In the

About the FFA

The French Insurance Federation (FFA) represents 280 insurance and reinsurance companies operating in France, accounting for over 99% of the French insurance market. We represent the interests of insurers to national, European and international public authorities; to institutions and to administrative or local authorities. We produce and make available statistical data essential to the industry and provide information for the general public and the media. The French Insurance Federation also contributes in raising the awareness and attractiveness of the industry by promoting insurance and risk management culture. FFA is a member of Insurance Europe and GFIA. In an ever-changing environment, faced with the emergence of new political, economic, social, technological and environmental risks, the French insurance industry constantly innovates to be more competitive, support the economy and extend the boundaries of insurability.

meantime, a transition period seems necessary to take into account the lack of such legal framework.

-French insurers are constantly updating the inventory of cross-border data flows to the United States and stressed the urgent need to define as soon as possible the "additional guarantees" as referred to by the CJEU. This implies a first step relating to the framework of this transfer, which falls within the sole competence of the European Union.

- The main processors on the European market should propose additional improvements and supplementary measures after a dialogue with the European institutions.

In light of these comments, the French Insurance Federation would like to provide the following response to this consultation:

The present EDPB recommendations must take into account the economic reality. First of all, the majority of digitalized European actors use services of American providers for current maintenance operations, giving these service providers access to their computer tools only for a precise technical operation and giving them access to limited personal data (professional email addresses, collaborators' name and surname, etc.). In accordance with the principle set out in paragraph 33 of the draft recommendations, it is necessary to take into account the data transfer context: it seems essential to differentiate according to whether the data is stored in a third country or whether there is only remote access to data stored in the EU/EEA. In the latter case, only SCCs should be applied without taking into account any other assessment (which implies that they are modified with respect to the clauses relating to the guarantee provided by the controller on the completion of this evaluation). This would be in line with the principle of proportionality and the need for a risk-based approach.

Despite the definition given in paragraph 6 (data exporter acting as data controller or data processor), the use of the term "you" in some paragraphs makes it difficult to identify the target of certain specific measures.

Furthermore, FFA stresses that this step n°3 of the assessment is extremely burdensome (both financially and in human resources). The obligation, for companies, to take into account in their assessment "any other source" other than the legislation accessible to the public, is simply unworkable; the notion used is thus too broad.

This assessment would amount to an analysis similar to what only the European Commission could and would need to do for the adoption of an adequacy decision.

Moreover, on this point, French insurers regret that even if the third country has been subject to an adequacy decision, such assessment remain mandatory.

With regard to complementary measures (step 4), FFA regrets that EDPB ends up to express doubts on the relevance of the means it itself presents as examples (e.g. the cryptography of data transferred to the United States). Moreover, some of the additional contractual measures proposed do not take into account the existing imbalance between the party responsible for processing and the major IT service providers (including Cloud providers). This is the case in paragraph 105 relating to the right of audit which provides that the data exporter could strengthen its power to carry out audits or inspections of importers' data processing facilities, on site and/or remotely, to determine whether data is disclosed to public authorities and under what conditions.

Additionally, protective practices to be excluded are listed in Annex 2. Those include the transfer and processing of personal data in the cloud in the clear or remote access for professional purposes; however, it is difficult to conclude in such a binary way which measures are protective and which are not. It would seem that simply sending e-mail addresses to access a service provider is considered as data deserving enhanced protection (data relating to privacy, health data, etc.). Once again, a risk-based approach should be favored.

A ban on such transfers to the US would, if taken to its logical conclusion, amount to a blanket ban on all transfers outside the EU since there are many cases of sub-outsourcing by secondary sub-processors. In order to avoid such a general ban, all data would have to be systematically encrypted or anonymized, which could then prevent the provision of the service sought.

Very few European providers are, for now, able to provide the same services that the ones provided by players located outside the EU. The tools and solutions they offer are truly indispensable to the customers' activity, since these solutions are widely deployed in their IT systems.

Regarding the procedure to follow (step 5), French insurers stress that the obligation to systematically notify the national data protection authority of the interruption of data export outside the EU is practically too burdensome to be workable and goes beyond what the GDPR states. Moreover, national data protection authorities would have a mapping of the providers with which European players collaborate, which goes far beyond the control of the implementation of a compliance approach, which is the guiding principle of the GDPR.

It seems essential that the European Commission should take responsibility for assessing legislation of the main third countries.

Finally, as the standard contractual clauses are linked to these additional safeguards, FFA underline the need for a 24-month transition period for the adoption of the new SCCs.