



December 2020

## FEDMA comments on the recommendation 1/2020 of the EDPB

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FEDMA thanks the European Data Protection Board for the opportunity to provide comments on the draft Recommendations 1/2020 on supplementary measures.

**Overall, FEDMA understands that international transfers are a complex topic with legal and political challenges. However, we remain very concerned by these EDPB recommendations,** because, in our view, the EU data protection standards are too high even for European business. They focus on protection and not enough on free movement of data, although the GDPR aims at reaching a right balance between the two.

**The EU is isolating itself and being uncompetitive compared to the rest of the world** (e.g. The EU led on 3G and 4G, but the USA is ahead for 5G unrolling). These recommendations will isolate the EU in terms of data transfers, trade, research and international cooperation. They send a general message of distrust and will encourage data localization.

**The draft recommendations contradict the added value of GDPR for SMEs.** Indeed, they will develop lack of consistency as business interpret differently other laws and safety measures to apply (companies should not have to do mini adequacy assessments), they will increase red tape and lack of consumer trust, also distrust among various data protection regimes.

**Privacy itself is being challenged as many SMEs are made liable.** Indeed, processors in between large controllers (eg in marketing, advertisers) and large processors (e.g. cloud service providers, software providers, etc) end up being taking all the liability.

**European controllers (companies) face severe difficulties to judge the legal requirements abroad in detail.** Rather than investing in a multitude of global law firms providing expertise in each single case, evaluation by the respective European institutions themselves is needed (e.g. the Commission and the EDPB).

**The impact of the EDPB draft recommendations will be multiple:**

- **European businesses are pressured to buy European services which can be more expensive,** EU is isolating itself from the rest of the world and EU businesses, especially SMEs, are being stifled. The data subject risks having to lose some services or paying them higher price.
- **They challenge the use and benefit of Standard Contractual Clauses as a data transfer tool. They raise the issue of the responsibility for the whole supply chain.** The recommendations will impact European businesses needing to make those data transfers directly, and European businesses relying on others to do so. Data marketers for example tend to rely on services (eg cloud, CRM platforms) which we require data transfers.
- **They challenge the GDPR's risk-based approach** or the CJEU (Schrems II) judgement which both instruct the data exporter to look at the context of the transfer before determining the protection measure. Instead, all personal data transfers are concerned as a risk from being intercepted by foreign intelligence, even if the data importer has never faced an order under its own domestic laws

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or the data is simply of no conceivable relevance to national security. The burden is on controllers to do adequacy assessment each time, regardless of risk.

- **They include a continuous and “flawless” encryption requirement (which should be at all moments outside the EU and to prevent any government access to data).** This would impact the data importer who would not be able to decrypt the data for processing, leaving no option where importer needs to see data in the clear.
- **There are significant impacts from the proposed guidance on the UK government’s [National Data Strategy](#) (“Strategy”).** The Strategy commits to a reduction in regulatory burden on business and for the UK to reduce barriers for data transfers internationally. These ambitious strategic commitments are undermined by the additional safeguards proposed by the EDPB by:
  1. Increasing regulatory burden on business by requiring them to perform complex legal assessments to facilitate data transfers.
  2. Jeopardising EU-UK data transfers where the UK approves data transfers with countries that are not ‘adequate’ and therefore subject to the additional safeguards outlined in the guidance.

FEDMA asks the EDPB for:

- **Take a risk-based approach** in determining which data should be transferred, and what commensurating technical and organisational measures need to be in place (e.g. transferring of log in and password data of employees).
- **Support to assess foreign laws;** i.e. EDPB to assess foreign laws instead of business
- **Clarification on what is high risk data** – is it comms metadata, social media activity, location data?
- **Clarification of what is low risk data.** We call for data exceptions regarding some essential low risk data such as CRM data (name, contact details), business contact data (name, work contact details).
- **Clarify Controller due diligence expectations** (processor flowdown).
- **Encryption:** flexibility for the data importer.

### **About FEDMA**

FEDMA is the Federation of European Direct and Interactive Marketing and represents the interests of data-driven marketers from across Europe in Brussels.

Data-driven marketing is a vital part of the European economy annually contributing billions of Euros across the 28 member states. Businesses use data-driven marketing to talk directly to existing and potential customers to promote products or services. It allows them to target people with a personalized message and is a cost-effective way to generate sales, build long-lasting relationships with customers and raise brand awareness.

It’s a data-driven industry that relies on data to deliver targeted, relevant, timely messages and enhance the customer’s experience. The industry has a large presence offline and online, in the form of advertising mail, mobile, email, social media, online and telemarketing.