

Response to the EDPB's public consultation on Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data

By the Digital Policy Committee of AmCham Germany

We welcome the EDPB's public consultation on the Recommendations 01/2020 to discuss supplementary measures as this is an important issue which affects thousands of businesses from SMBs to international corporations which rely on international data transfers.

Due to the importance of this issue, we appreciate the European Data Protection Board to extending the deadline to Dec 21 for a meaningful contribution from various stakeholders.

Summary:

- We acknowledge that the EDPB has a challenging task in developing concrete Guidance based on the Schrems II ruling by the CJEU, giving organisations legal certainty when transferring data outside the EU.
- Nevertheless, the EDPB Recommendations will not create legal certainty as it is highly disproportionate and puts a heavy burden on organisations, with obligations which will be hard or almost impossible to comply with in practice.
- The EDPB Recommendations inappropriately focuses on specific technical measures and precludes reliance on organisational, contractual and other measures. It is also not apparent why the EDBP rejects a risk-based approach.
- The complex and disproportionate Guidance again highlights the need for a near-term EU-US political agreement on an enhanced Privacy Shield.

In general

- Overall, the EDPB Recommendations places a heavy burden on organisations and will require significant resources to comply. As the Guidance requires a detailed analysis of the applicable law in the target country as well as how this will impact requirements by EU law, this will require legal advice from several jurisdictions many companies will not have available to them.
- Many of the affected companies are small businesses and organisations for which it will be very difficult to comply with the Recommendations in practice. Even for larger organisations with time, resources and expertise, achieving compliance with these obligations is almost unrealistic given the scale at which they need to be carried out to comply with the EDPB Recommendations (i.e. the conducting of a detailed assessment for each and every transfer, requiring specialist legal advice in respect of the laws each third country and how it impacts the protection of data).

- It is fair to assume that the Recommendations will lead to a dramatic reduction in personal data transfers which comes at the cost of ceasing the availability of services and trading relationships which will ultimately lead to an economic damage for thousands of companies which need to transfer data outside the EU as data streams underpin international trade.
- Today, practically no organisation, irrespective of sector, would be able to do business without the ability to transfer data cross-borders. The EU's global trade is inextricably linked with the cross-border flow of data with partners outside the EEA, including in particular the US. Currently, Standard Contractual Clauses (SCCs) are the principal legal instrument relied on by EU-based businesses for transferring personal data to third countries. These businesses and organisations are looking to the EDPB Guidance for guidance as to how to continue to carry out transfers. Yet, the EDPB Recommendations effectively seeks to prohibit reliance on SCCs by many EU businesses – especially those using key US service providers such as those which provide email and communications services, cloud services and others.

Towards a proportionate approach

- **Balancing of fundamental rights:** The EDPB Recommendations does not acknowledge the importance of other fundamental rights and freedoms such as the right to freedom of expression and information or the freedom to conduct a business. This leads to a disproportionate approach which will make it incredibly difficult for organisations to transfer data to countries outside the EU. The GDPR states that the right to the protection of personal data must co-exist and be balanced against these other fundamental rights.
- **Reliance on a combination of measures:** The EDPB Recommendations essentially requires organisations to implement specific technical measures in order to rely on the SCCs in many cases and preclude reliance on organisational, contractual and other measures. In doing so, the EDPB Guidance departs significantly from the wording of the GDPR and the *Schrems II* ruling – neither of which prioritised technical measures over and above other types of measures, such as organisational, contractual or legal. The EDPB Recommendations should explicitly state that GDPR and the ruling in *Schrems II* permit reliance on a combination of measures – and make clear that there is no hierarchy of measures. The flexibility afforded to exporters, in particular, by the GDPR and *Schrems II* must be respected by the EDPB. The EDPB Guidance should provide a clear path to allow business to take steps to comply with GDPR in a manner that is appropriate and, consistent with the EU Commission's approach, recognise the importance of contractual and organisational measures.
- **Incorporation of a risk-based approach:** The EDPB Guidance notes that one should "not rely on subjective factors such as the likelihood of public authorities' access to data". Likelihood is a very relevant factor that the GDPR relies on. Likelihood in the sense of probability is also not a subjective factor, it is an objective factor and probability is relevant if the GDPR's rules are applied in line with the principle of proportionality and its risk based approach. Declaring likelihood of public authorities' access to data also means that even if public authorities' access to the data in a manner not in line with EU standards is highly likely, it would have to be disregarded.
- **Recognition of recent changes in US law:** Yet, the Guidance does not take into account that US surveillance laws have changed after the lawsuit filing and this should be taken into account.. In addition, further information has become available (such as now declassified information) demonstrating how the relevant safeguards and protections apply in practice, including those in

relation to targeting determinations (and in particular, the requirement that the government memorialize a reasoned, written targeting determination for each individual target that is then subject to audit in a process supervised by the FISA Court) and querying procedures such as the information contained in the USG White Paper and explained in the Intelligence Community's 2018 Transparency Report.

- **Derogations:** The EDPB Recommendations continues to push for an overly restrictive interpretation of the derogations under Article 49 GDPR. The GDPR does not impose such a narrow view as has been taken by the EDPB in the EDPB Recommendations or the Guidelines 2/2018 on derogations of Article 49 GPDR. The narrow approach which the EDPB applies to derogations in Article 49 GDPR means that there will be no alternative legal transfer bases for these organisations to avail of when it comes to routine transfers absent SCCs. In other words, many services which have come to be regarded as almost essential by EU businesses and other organisations will cease to be available to them.