

COCIR feedback to the EDPB Recommendations 01/2020 on supplementary measures for data transfers ¹

COCIR welcomes the opportunity to provide feedback to the EDPB Recommendations 01/2020 on supplementary measures for data transfers.

COCIR greatly appreciates that the European Data Protection Board wants to help data exporters with the complex task of assessing third countries and identifying appropriate supplementary measures where needed, in particular following the Schrems II ruling by the Court of Justice of the European Union².

Organisations require legal certainty and clarity in order not only to respect their obligations, but also to respect the trust of the users of their products and services. There is a clear need for a robust and future-proof framework to ensure the continuity and predictability of data flows based on an equivalent level of data protection.

Having said that, COCIR would strongly recommend the European Data Protection Board to reconsider its current positioning and align its views with the European Commission and the European Data Protection Supervisor on a **risk-based approach**.

Without a risk-based approach for instance many activities that are fundamental to the basic working and functioning of organisations in an international context would become unworkable or illegal. Similar to a data protection impact assessment, transfers to third countries could be properly assessed taking into account aspects such as the type and nature of personal data, purpose limitation and storage limitation.

Such a **transfer impact assessment** could be integrated in the roadmap presented in the document, which provides a valuable tool for data exporters to assess whether supplementary measures may be needed in order to legally transfer personal data outside the European Economic Area.

COCIR would recommend the inclusion of a flowchart to provide an easy-to-use visual overview of the steps to take in this assessment process. This could be done based on the flowchart the EDPB has used in its social media communications accompanying the release of this Recommendations document.

COCIR considers the insertion of **use cases** useful in building a better understanding, however regrets that many use cases present an overly prescriptive and restrictive view on what may constitute valid supplementary measures, for instance by

- Ignoring the limited capability and capacity of assessing legislation in third countries, especially when the legislation governing the access to data by public authorities is ambiguous or not publicly available (Use Case 2), or when data exporters should consider bilateral or multilateral collaborations between public authorities from different jurisdictions where takes place (Use Case 5)
- Raising unrealistic expectations on the data exporters and importers in determining the ability of third countries or third parties to brute-force encryption (Use Case 1) or to possess or exploit data about a person for which data has been pseudonymised (Use Case 2)
- Specifying requirements in absolute terms, such as ruling out the existence of backdoors in hardware or software (Use Case 3)

¹ https://edpb.europa.eu/our-work-tools/public-consultations-art-704/2020/recommendations-012020-measures-supplement-transfer_en

² <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CJ0311>

COCIR would also recommend to underline the **relative approach to the concept of personal data**. We would like to refer for instance to the EU-US Privacy Shield principles for pharmaceutical and medical products, in particular on key-coded data³;

g. Key-coded Data

Invariably, research data are uniquely key-coded at their origin by the principal investigator so as not to reveal the identity of individual data subjects. Pharmaceutical companies sponsoring such research do not receive the key. The unique key code is held only by the researcher, so that he or she can identify the research subject under special circumstances (e.g., if follow-up medical attention is required). A transfer from the EU to the United States of data coded in this way would not constitute a transfer of personal data that would be subject to the Privacy Shield Principles

It would therefore be very helpful if the following statements could be supplemented by the text “as it ensures that data transferred to the recipient country does not constitute personal data.”:

- then the EDPB considers that the encryption performed provides an effective supplementary measure. (Use Case 1)
- then the EDPB considers that transport encryption, if needed in combination with end-to-end content encryption, provides an effective supplementary measure. (Use Case 3)
- then the EDPB considers that the transport encryption performed provides an effective supplementary measure (Use Case 4)
- then the EDPB considers that the split processing performed provides an effective supplementary measure. (Use Case 5)

COCIR remains available to provide further clarification or assistance to the EDPB where needed.

About COCIR

COCIR is the European Trade Association representing the medical imaging, radiotherapy, health ICT and electromedical industries.

Founded in 1959, COCIR is a non-profit association headquartered in Brussels (Belgium) with a China Desk based in Beijing since 2007. COCIR is unique as it brings together the healthcare, IT and telecommunications industries. www.cocir.org

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016D1250&from=EN>