

EXTERNAL NOTE

Public consultation draft Recommendations on data transfers - VBOFEB response

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Summary

The invalidation of the Privacy Shield is of great concern to VBOFEB and its members. International data flows are an existential pillar of global trade, and disruptions to their free flow are a major challenge across all kinds of economic activity. The recent developments following the Schrems II judgment¹ in the European Union are creating deep uncertainty throughout the world. VBOFEB is concerned that the draft Recommendations adopted by the European Data Protection Board (EDPB) with respect to supplementary measures for personal data transfers² (hereafter ‘draft Recommendations’), in their current form, do not provide sufficient support for Belgian and European companies.

Overall, VBOFEB, considers that the draft Recommendations :

- are too prescriptive and therefore reject the risk-based approach of the GDPR by treating all personal data flows, regardless of the context, as being of interest to law enforcement authorities ;
- unnecessarily and excessively impose specific technical measures in all situations;
- emphasise unusable end-to-end encryption and force decryption keys to remain in Europe;
- create legal uncertainty as they do not achieve a balance between the free flow of data and the protection of privacy currently promoted by the GDPR;
- hinder the free flow of data, which has a negative impact on digital commerce and the benefits it offers to European society.

Finally, since the Schrems II ruling, VBOFEB continues to promote a reasonable grace period before this new framework comes into effect. Suddenly placing the responsibility on data exporters to evaluate whether a 3rd country’s legal regime is essentially equivalent with the GDPR represents a steep learning curve.

¹ C-311/18.

² Draft Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data.

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1 Introductory remarks

The invalidation of the Privacy Shield is of great concern to VBOFEB and its members. International data flows are an existential pillar of global trade, and disruptions to their free flow are a major challenge across all kinds of economic activity. The recent developments following the Schrems II judgment³ in the European Union are creating deep uncertainty throughout the world.

The hopes and expectations about the solutions that the European Data Protection Board (EDPB) guidelines would provide were therefore high. VBOFEB is concerned that the draft Recommendations adopted by the EDPB with respect to supplementary measures for personal data transfers⁴ (hereafter ‘draft Recommendations’), in their current form, do not provide sufficient support for Belgian and European companies. These draft Recommendations seem to be mandating drastic measures for all data transfers and this would in essence impede or severely hamper the conduct of business outside of the European Economic area, with no corresponding benefits in terms of data protection.

Overall, VBOFEB, like BusinessEurope and Digital Europe, considers that the recommendations of the EDPB :

- are too prescriptive and therefore reject the risk-based approach of the GDPR by treating all personal data flows, regardless of the context, as being of interest to law enforcement authorities ;
- unnecessarily and excessively impose specific technical measures in all situations;
- emphasise unusable end-to-end encryption and force decryption keys to remain in Europe;
- create legal uncertainty as they do not achieve a balance between the free flow of data and the protection of privacy currently promoted by the GDPR;
- hinder the free flow of data, which has a negative impact on digital commerce and the benefits it offers to European society.

VBOFEB is of the opinion that more pragmatic guidelines are needed for the transfer of data and that these should take into account:

- Following a risk-based approach that takes the full context of data transfers into account;
- The possibility to continue relying on contractual and organisational measures;
- Developing workable technical solutions (rather than overreliance on encryption).

2 Specific remarks on the draft Recommendations

2.1 Assessing adequacy of third country legislation

In the absence of an adequacy decision, the draft Recommendations seem to leave the assessment of third-country law and practice to the individual controller. This is an extremely difficult, time consuming and costly exercise. The draft Recommendations do not contain

³ C-311/18.

⁴ Draft Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data.

sufficient concrete guidance for data exporters and importers. VBOFEB therefore asks the EDPB if it could provide more concrete recommendations on how a company should evaluate the legislation of a third country: what elements should be taken into account when assessing the legislative framework of another country? Can EDPB give more examples of legislation that will be considered (not) sufficient and why? This would be of great help to companies.

2.2 Making access impossible or ineffective is often not practically feasible

the draft Recommendations indicate in general terms that contractual and organisational measures will "generally" not be sufficient and can only complement technical measures to prevent access by public authorities of third countries.

The draft Recommendations insist that all transfers should make access to the transferred data "impossible or ineffective" for public authorities, regardless of the circumstances surrounding the transfer, simply on the basis of a theoretical possibility of unjustifiable interference by public authorities of third countries. VBOFEB insists that in many cases drastic measures of this kind are disproportionate to the benefits in terms of data protection. Furthermore these measures are practically not feasible for Belgian and European companies.

2.3 Full circumstances surrounding the transfer - risk based approach

The *Schrems II* ruling refers to the need to consider each specific transfer "*in the light of all the circumstances of that transfer*". The general GDPR rules with regard to technical and organisational measures, require due consideration for "*the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons*" (articles 25 and 32).

The draft Recommendations do recognise some circumstances - including the nature of the data, the complexity of the data processing workflow and the possibility of onward transfers - proceed to only specify technical measures pertaining to one type of circumstance, i.e. the format of the transferred data (plain text, pseudonymised or anonymised).

VBOFEB is of the opinion that a risk based approach should be adopted. This would mean for example that if the data is of limited real-world interest to public authorities - for example business contact information or other low-risk personal data - this should have a bearing on the type of supplementary measures that are required. Experience companies have had with these types of requests in the past should also be factored in.

2.4 Binding corporate rules and ad hoc clauses

The draft Recommendations repeat that the *Schrems II* judgement also applies to binding corporate rules (BCRs) and to ad hoc contractual clauses.

VBOFEB would like to underline that both BCRs and ad hoc clauses are adopted by the competent data protection authority (DPA). Therefore VBOFEB would like to invite the EDPB to provide clearer reassurance to companies as to the continued validity of these instruments.

2.5 A grace period

Finally, since the Schrems II ruling, VBOFEB continues to promote a reasonable grace period before this new framework comes into effect. Suddenly placing the responsibility on data exporters to evaluate whether a 3rd country's legal regime is essentially equivalent with the GDPR represents a steep learning curve.

3 Conclusion

It can therefore be concluded that, as currently drafted, the draft recommendations will make Europe's ability to operate in the global economy unreasonably difficult. VBOFEB clearly requests that the final recommendations provide businesses with a more balanced toolbox of additional measures where data exporters can rely on based on their assessment of the overall circumstances surrounding the specific transfer in question.

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