

30 November 2020

Feedback of

**ACT | The App Association
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Rue de Trèves 45,
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to

The European Data Protection Board

on its

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

ACT | The App Association Feedback to the European Data Protection Board (EDPB) Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data

I. Introduction and Statement of Interest

ACT | The App Association (“App Association”) writes to provide feedback to the European Data Protection Board (EDPB) recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data.

The App Association is a not-for-profit trade association located in Brussels, Belgium, that represents more than 5,000 small and medium-sized application developers and connected device companies located across the European Union (EU) and around the globe. We are committed to European leadership in innovation, as well as supporting competition and growth in the Digital Single Market (DSM). The App Association dedicates itself to creating an economic and regulatory environment in which small and medium digital players can thrive. Today, the ecosystem the App Association represents—which we call the app economy—is valued at approximately €830 billion globally and is responsible for millions of jobs across Member States of the EU.

The seamless flow of data between economies and across political borders is essential to the functioning of the global economy. Innovative app development companies must be able to rely on unfettered data flows as they seek access to new markets. Alongside the world’s rapid embrace of mobile technology, our members have been developing innovative hardware and software solutions that power the growth of the internet of things (IoT) across modalities and segments of the economy. App Association members include many EU-based innovators who develop mobile technology products in both established and emerging markets. How our members can use, share, and transfer data affects how their products function and how consumers engage with those products and services. Our members handle and work with data every day, so they are committed to ensuring compliance with EU data protection rules.

The recent invalidation of the EU-U.S. Privacy Shield has left many questions unanswered and leaves Privacy Shield participants, including our members, exposed to data flow disruption, new compliance expenses, and uncertainty. We thus appreciate that the EDPB wants to supplement transfer tools and protect personal data.

II. The proposed EDPB Recommendations 01/2020

For many years, the limits that European data protection requirements place on companies’ ability to transfer data to countries outside of the EU have presented a challenge. Agreements like Safe Harbour and Privacy Shield provided much-needed legal certainty to our members facing new commercial challenges in the digital economy and navigating emerging political developments. For many of our members, participating in the EU-U.S. Privacy Shield allowed them to have access to a streamlined and less expensive means to comply with EU data protection laws. They could avoid complex contract negotiations with potential EU business partners that they would otherwise face and clarify their commitment to data security and privacy. The invalidation of the Safe Harbour agreement, and then the Privacy Shield, has removed this positive assurance. We appreciate that with these guidelines, the EDPB is trying to regenerate some much-needed certainty.

The EDPB recommendations on ‘measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data’, include six steps for implementation for data controllers and data processors to complete before transferring data. Annex 2 covers a ‘non-exhaustive’ list of supplementary steps to take. The EDPB’s guidelines are impressively thorough and complex, but they demand in-depth analysis by companies looking to use them as a roadmap. While we recognize that the EDPB’s proposed

recommendations are not binding, they are without question influential and can be effectively binding. At a minimum, the EDPB's proposed recommendations present an added administrative burden on small businesses and will likely be relied on by Data Protection Authorities (DPAs) and others.

The first step is for data exporters to 'know their transfers', which requires recording and mapping transfers. While this may be feasible for most businesses, once transfers are mapped and recorded, data exporters are encouraged in the second step to identify the transfer tools they rely on for the transfer in question. These tools can include a broad range of mechanisms, such as adequacy decisions, transfer tools under the General Data Protection Regulation's (GDPR) Article 46 (Standard Contractual Clauses, or SCCs, and Binding Corporate Rules, or BCRs), or derogations under GDPR Article 49. This evaluation requires at least some legislative knowledge and expertise that small businesses without legal departments may not have and would likely struggle to outsource. In the third step, if relying on SCCs or another GDPR Article 46 transfer tool, the guidelines leave it to data exporters to assess if the mechanism they rely on guarantees a data protection level that is 'essentially equivalent' to EU standards. The due diligence required for a business to make such an assessment constitutes a prohibitive barrier for many data exporters. Not only does such an evaluation require extensive documentation, but it also has to take into account laws, precedent, and practice related to data access for law enforcement, regulatory supervision, and national security purposes in third countries. If an Article 46 GDPR transfer tool is deemed to be 'not effective', the EDPB recommends the implementation of 'supplementary measures' that can be of contractual, technical, or organisational measures. Ascertaining which supplemental steps or combination thereof is 'effective' requires another extensive assessment, and the implementation of these additional safeguards may not be a realistic option for businesses that nonetheless depend on data transfers to third countries, especially since the implementation, as recommended in the fifth step, may demand further procedural steps, e.g., getting authorisation from an EU supervisory authority for supplementary measures. Once companies have completed all these steps and assessments, the EDPB recommends regularly reassessing their approach. If no supplementary measure can resolve the inadequacy or are no longer effective in the third country or the data importer has breached its commitments, the EDPB states data transfers should be promptly suspended or ended.

Based on the above, we are highly concerned that the recommendations of the guidelines are too onerous to effectuate for small companies like our members. They face practical challenges to enable and protect data flows and to keep European consumer data safe and secure every day. The small business developer community the App Association represents practices responsible and efficient data usage to solve problems identified across consumer and enterprise use cases, as evidenced by the fact that small businesses made up 70 percent of the participants of the Privacy Shield. Our members' customers have strong data security and privacy expectations. As such, ensuring that their business practices reflect those expectations by utilizing the most advanced technical protection mechanisms (e.g., end-to-end encryption) is already a market-driven necessity for our members that are fully leveraged today. Further, App Association members are committed to gaining and maintaining end user trust by challenging all unlawful requests from governments for data.

In the absence of the Privacy Shield, the task of maintaining international data transfer standards has become almost impossible for our members who cannot afford to use SCCs or invest the time and resources into implementing the options proposed by the EDPB. While there are concrete examples in the guidelines, it is not realistic to expect small businesses to follow them. This is a significant, if not prohibitive, barrier for SMEs. While the guidelines are non-binding, they essentially create a competitive disadvantage for the businesses that cannot comply with them. This very is concerning to us as the essential purpose of the Privacy Shield was to take some administrative burden away from (small) businesses and level the playing-field. The fact that many small companies already cannot fall back on tools like SCCs and BCRs, and the reality of these new non-binding guidelines highlight the need for a new mechanism, like the Privacy Shield, that is streamlined and makes compliance easy for small businesses

that rely on data transfers. As such a construct is currently being negotiated, we are concerned that the EDPB's guidelines may harm small companies in the meantime and create long-lasting negative impacts for these businesses, such as loss of consumer trust.

The EU-U.S. Privacy Shield provided our members with an essential means of legal certainty after ensuring their alignment with data protection principles that are well-supported by the app developer community. In practice, our members' policies exceeded the former Privacy Shield requirements in many instances, but it gave them the ability to publicly differentiate themselves from other businesses and served as a means of demonstrating alignment with the values that our members' customers in the EU prioritize. We are concerned our members that are acting in good faith will bear the risks stemming from the EDPB guidelines' lack of flexibility and scalability. We encourage the EDPB and other European data protection authorities to refrain from enforcement actions until a new transatlantic data transfer agreement is agreed upon.

Cross-border data flows between the United States and the European Union are the largest in the world and underpin a 5.9 € (\$7.1) trillion bilateral trade and investment partnership.¹ Our members' ability to engage in transatlantic commerce, scientific collaboration, and research and development is now at risk with potentially severe ramifications for the post-pandemic economic recovery. The guidance offered by the EDPB, while extensive, is not practical, and our members may still be unable to follow the guidelines and legally transfer personal data to third countries.

We appreciate the consideration of our views and stand ready to work with you on these important issues.

Sincerely,



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¹ U.S. Secretary of Commerce Wilbur Ross Statement on Schrems II Ruling and the Importance of EU-U.S. Data Flows, 16 July 2020. <https://www.commerce.gov/news/press-releases/2020/07/us-secretary-commerce-wilbur-ross-statement-schrems-ii-ruling-and>