

Copenhagen, 14 December 2020

Schrems II - EDPB Guidelines

Submission to the consultation

“Danish Entrepreneurs” thank you for the opportunity to submit our feedback on the European Data Protection Board (EDPB) Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the European Union (EU) level of protection of personal data (the Recommendations).¹

To be clear, with the Recommendations, the EDPB imposes burdensome and insurmountable legal obstructions on the ability to conduct international data transfers. This will have far-reaching negative impacts on European businesses and especially on European entrepreneurs’ opportunities to grow and scale their businesses at a moment in time, where economic growth is vital to the welfare of European citizens.

In the post COVID economy, start-ups offer significant potential and willingness to play a role in the green and digital recovery of the economy. International data transfers are an integral part of the global economy’s operation and social exchanges. Start-ups, scale-ups and small businesses across the EU depend on the possibility to transfer personal data to third countries around the world. This is vital not only to these businesses’ ability to operate in a global economy, but also to the many citizens who benefit from the services of these businesses in day to day life.

The Recommendations fail to acknowledge the reality of startups who have less resources and less time than established businesses. The Recommendations place a heavy burden on startups that in most cases will not have the capability to achieve and maintain compliance. For example, the roadmap requires a detailed analysis of the characteristics of every transfer and an assessment of all applicable local laws requiring specialist multi-jurisdictional legal advice to be routinely re-evaluated. Startups and many scale-ups will simply not be able to afford this.

The Recommendations also specifically call for additional supplemental measures that make access impossible or ineffective in the third country. In practice, this would prohibit start-ups and scale-ups from relying on many global service providers that provide communication services (email, videoconferencing, etc.) or money transfers that must access personal data to deliver these services.

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

The cost of implementing some of the recommended safeguards would make many of these businesses unviable. For those startups that can afford it, the reality is that the investment needed to comply with the Recommendations will inhibit their ability to challenge and compete against larger companies.

The Recommendations will have a chilling effect on startups' ability to grow. Fundamentally, businesses that have made it to a position where they are able to scale their businesses, will do so. However, with the current measures on international data transfers, startups will have to make tough decisions on if and where they can expand their business to. In a global and digitalised economy where products are increasingly offered as services and tailored to specific segments, expansion to other regions can be key to the business' longer-term existence.

The Recommendations undermine and will damage startups' and entrepreneurs' rights and opportunities by failing to adopt a proportionate and risk based approach as enshrined in the GDPR. A proportionate and risk-based approach is key to ensure that startups can leverage digital technologies to benefit the EU users, while protecting individuals. The standard set by the EDPB in the Recommendations reflects a pursuit of impossible perfection, which will prevent startups from adapting safeguards that reflect their own unique use of data. Additionally, the rights of startups and founders are undermined by not acknowledging the importance of other fundamental rights and freedoms, including the right to freedom of expression and information (Articles 11 and 7 of the Charter) and freedom to conduct a business (Article 16 of the Charter). Furthermore, with the Recommendations, the EDPB is fundamentally getting into conflict with the objectives set by the European Commission to simplify and reduce the administrative burden placed on SME's within the EU².

Start-ups are dedicated to protecting user's data and recognise that in our digitally enabled world, we all have a role to play. Fundamentally, startups want to compete, innovate and provide their products and services to global markets. Therefore, it is crucial to startups to comply with data protection rules. On the one hand, data practices pose a risk to startups, as one mistake can violate customer trust and put an end to a startup. On the other hand, data practices present an opportunity for startups looking to show responsibility. As such, sound data practices are good business. If there are mechanisms on top of existing robust adequacy agreements which enable them to show more responsibility, this would be welcomed by many founders.

In order to ensure that international transfers of personal data can be maintained in a way that guarantees legal certainty for startups, we call for:

- The EDPB to avoid an overly restrictive approach and to adopt a pragmatic one. New data transfer tools must be fit for purpose not only for big players but also for startups. As such, they should be affordable, straightforward and technology-neutral.

² https://ec.europa.eu/info/sites/info/files/communication-sme-strategy-march-2020_en.pdf

- Any legislative measure, including supplementary measures to data transfer tools, pose additional costs and potential hurdles for startups. They should therefore be carefully and proportionally weighed against the potential benefit they envisage to achieve.
- The Recommendations to provide practical and workable guidance that will allow for smaller players such as startups to take steps to ensure that they can continue to transfer data in a manner which respects the essence of EU data subjects' GDPR rights and without ignoring other Charter rights of EU organisations.
- The EDPB should place greater emphasis on the reality of smaller businesses and refrain from including impossible standards such "flawless implementation" of certain safeguards. Flawless does not exist in the real world.
- The EDPB will not - as is now the case - step away from the risk-based approach enshrined in the GDPR. EDPB places start-ups in a nearly impossible position, but companies should adapt safeguards that reflect their own unique use of data. The risk-based approach from the GDPR should be respected.

Europe has an ambitious agenda for it's recovery, and it is paramount to the welfare of European citizens to ensure everyone who has the capability to contribute to the growth of the economy, are enabled to do so. Start-ups and scale-ups across the EU share these ambitions, but cannot deliver on them if they are held back by overly burdensome regulation. Therefore, we urge the EDPB to consider the concerns raised in this feedback, and start working towards enabling international data transfers rather than prohibiting them.

We welcome constructive dialogue on how the EDPB can ensure that international data transfers are available to European startups.

Yours sincerely



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