

European Data Protection Board
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ONS KENMERK
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 LEUVEN

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

KU Leuven welcomes your Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data and the call for comments on the current version.

After consultation of the data protection officers of the University, the University Hospitals and the legal advisors of our technology transfer office Leuven Research and Development, we would like to submit the comments below:

- 1) **The requirement on data exporters to assess the relevant laws in the third country** will not only be enormously onerous in practice and difficult from a legal point of view, this 'privatisation' of adequacy or equivalence assessments will also lead to diverging results between different organisations. It would be more efficient and uniform to conceive a proper method (which ensures adequate stakeholder involvement) to have this assessment of relevant legislation in third countries made at European level.
- 2) **Paras. 25** – *“Article 49 GDPR has an exceptional nature. The derogations it contains must be interpreted restrictively and mainly relate to processing activities that are occasional and non-repetitive”*. This interpretation of the EDPB seems a tightening of Article 49, 1, 2nd paragraph since the latter determines that *“Where a transfer could not be based on a provision in Article 45 or 46, including the provisions on binding corporate rules, and none of the derogations for a specific situation referred to in the first subparagraph of this paragraph is applicable, a transfer to a third country or an international organisation may take place only if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data”*. The wording of the GDPR seems to imply that you can use a) to g) for repetitive situations.
- 3) **Para. 42** - *“if you still wish to envisage the transfer, you should look into other relevant and objective factors, and not rely on subjective ones such as the likelihood of public authorities’ access to your data in a manner not in line with EU standards”*. Why does the EDPB seem to reject the risk-based approach although the GDPR contains several references to the assessment of risk factors (e.g. article 35 and recitals 89, 90 and 91)