

COMMENTS ON PROPOSED EDPB GUIDELINES 2/2020 (18. May 2020)

Introduction

The Norwegian Institute of Public Health and the Cancer Registry of Norway respectfully submit their comments on Guidelines 2/20 on articles 46(2) (a) and 46(3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies (hereafter, the Guidelines).

Scientific researchers have struggled to identify an appropriate safeguard under the GDPR for cross-border transfer of personal data to third countries and international organizations. This has gravely affected scientific research collaborations in the health research field. We consider several of the appropriate safeguards to have the potential to become excellent instruments for such data transfers, however, that requires that the Guidelines do not introduce statutory conflicts with third countries' legal frameworks.

The Norwegian Institute of Public Health and the Cancer Registry of Norway have initiated the establishment of an administrative arrangement for personal data transfer for scientific health research purposes to public bodies in U.S. We would like to draw your attention to three issues in the Guidelines we consider to potentially pose obstacles to this establishment:

1. Binding language

The Guidelines suggest binding language, seemingly also for administrative arrangements. Recital 108 GDPR makes it clear that administrative arrangements are not presumed to be legally binding. It is our understanding that the approved ESMA administrative arrangement reflects this. However, the wording used in the Guidelines could create confusion with the use of "will" and "shall" instead of "intends" and "should".

2. Redress mechanisms

The U.S. cannot offer a judicial redress mechanism, as one does not exist under U.S. law for these purposes. Nor can a U.S. public institution agree to binding arbitration or alternative dispute resolution. Paragraph 48 of the Guidelines notes that another option is that "the public body transferring the personal data could commit to be liable for compensation of damages through unlawful processing of the personal data which are testified by the independent review," however, we question whether transferring EEA public bodies would be able to take on this commitment where the U.S. public body is a joint controller.

The Guidelines mentions, in the same paragraph, that "Exceptionally, other, equally effective redress mechanisms could be put in place by the agreement." We have not been able to identify any such mechanism, and respectfully ask for an example from the EDPB of a mechanism that is neither in contradiction with U.S. law, nor puts the liability for a U.S. joint controller on the EEA public body.

3. Third countries' archiving requirements

According to the U.S. Federal Records Act, U.S. public bodies are required to create records schedules. Most research records are destroyed seven years after they are no longer needed for scientific reference, which depends on the specific project. For certain projects of historical significance, there is a requirement to keep the records permanently. We would appreciate clarification as to whether third countries' archiving requirements can be fulfilled under the derogations for scientific research and archiving purposes in the public interest, according to Articles 5(1)(b), 5(1)(e) and 89(1) GDPR.

We appreciate the opportunity to provide these comments.

This document has been approved electronically.

Yours sincerely,

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