

Dr. Andreas Splittgerber
Rechtsanwalt | Partner
CIPP/E
Email: asplittgerber@reedsmith.com
D: +49 89 20304 152

Dr. Thomas Fischl
Rechtsanwalt | Partner
Email: tfischl@reedsmith.com
D: +49 (0)89 20304 178

Christian Leuthner
Rechtsanwalt | Senior Associate
CIPP/E
cleuthner@reedsmith.com
D: +49 69 22228 9846

Reed Smith LLP
Von-der-Tann-Str. 2
80539 München
Telefon: +49 (0) 89 20304 159
Fax: +49 (0) 89 20304 199

Private/Confidential

European Data Protection Board (EDPB)
Rue Wiertz 60
B-1047 Brussels
Belgium
edps@edps.europa.eu

21 December 2020

Comments - EDPB's Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data of 11 November 2020 ("EDPB Recommendations")

Dear EDPB,

As a law firm with many specialized attorneys in the field of data protection law and many clients who rely on our advice in this area, we would briefly like to take the liberty of commenting the EDPB Recommendations.

The Schrems II decision has brought EU and non-EU businesses into a very difficult situation. Guidance by data protection authorities on EU and Member State level following the decision partly provided ideas for solutions, but often were rather theoretic and not practical in nature. We welcome in this regard the style of the EDPB Recommendations that guides businesses through the required assessment in six structured steps and also appreciate that it is extremely difficult to provide a practical solution that works globally for all sorts of businesses.

We are aware that the EDPB does receive a high number of comments on this paper. We, therefore, would only like to focus on three items in the EDPB Recommendations that, in our perception, put major obstacles to businesses:

- I. **Step 3: Recipient country assessment:** Most private businesses do not have the means to perform this step. Following the EDPB, the aim of this Step 3 is to "*assess if there is anything in the law or practice of the third country that may impinge on the effectiveness of the appropriate safeguards of the transfer tools you are relying on, in the context of your specific transfer*". Even

Reed Smith LLP ist eine Limited Liability Partnership nach dem Recht des Staates Delaware, USA.

Die Liste der Partner und angestellten Anwälte sowie der Gerichte, für die sie zugelassen sind, kann auf der Website www.reedsmith.com eingesehen werden..

ABU DHABI • ATHENS • AUSTIN • BEIJING • BRUSSELS • CENTURY CITY • CHICAGO • DALLAS • DUBAI • FRANKFURT • HONG KONG • HOUSTON • KAZAKHSTAN • LONDON • LOS ANGELES • MIAMI • MUNICH • NEW YORK • PARIS • PHILADELPHIA • PITTSBURGH • PRINCETON • RICHMOND • SAN FRANCISCO • SHANGHAI • SILICON VALLEY • SINGAPORE • TYSONS • WASHINGTON, D.C. • WILMINGTON

with the additional recommendations by the EDPB 02/2020 on the European Essential Guarantees for surveillance measures, small or medium size businesses will not be able to make this assessment. Such legal assessment sometimes takes the EU-Commission a couple of years and easily could eat up a six or seven digit EUR-number. Especially in light of a uniform interpretation of GDPR, the EU should shoulder the Step 3 assessment as its task – at least on a general basis.

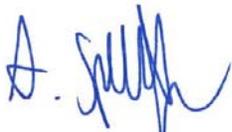
II. **Step 4: Riskbased approach:** GDPR, ECJ in Schrems, the EU Commission in its draft decision on the new Model Clauses and the EDPB in the EDPB Recommendations stipulate a risk based approach when assessing whether or not the requirements of Art. 44 GDPR are met. The EDPB Recommendations assume the risk based approach as otherwise there would not be room for Step 4, however, the EDPB Recommendations are not sufficiently clear to this end. The risk-based approach is firmly anchored in the GDPR, also in the part on data transfers (Art. 44 GDPR). The level of protection is not and need not be absolute. For example, if an organization takes appropriate technical and organizational measures to defend against a hacking attack, then the defense must be strong, but the GDPR accepts that a successful hacking attack may still occur. Access by a US intelligence service is no different. The EDPB Recommendations should spell out the risk based approach much clearer.

III. **Use cases: Not practical:** Most of the use case are helpful and we understand that “clear cut” cases make better examples than “borderline-cases”. However, generally all of the use cases are rare in practical live. For example,

- a. Use case 2: Pseudonymized data is often subject to data transfers, however, in many cases third parties (e.g. the data subject in case of cookie usage and cookie IDs or the telco provider in case of an IP address) do have means to de-identify. The case described in use case 2 is rather untypical in practice.
- b. Use case 6: EDPB fails to assess in sufficient detail (a) the technology side and (b) the actual circumstances of the relevant transfer/data access. The picture drawn in use case 6 will typically not occur in this form in practice.
- c. Use case 7: Like in use case 6, the example does not open up a possibility to adjust to the individual circumstances, such as types of data, amount of data, technical measures, access rights concept.

We thank you very much for considering our thoughts. If helpful, we would be more than happy to provide more details or participate in a discussion round to come to a practical and “data protective” approach for this difficult topic of international data transfers.

We thank you very much for your efforts and want to wish the entire team a Merry Christmas and all the best for 2021, after a anything but normal 2020.



Andreas Splittgerber
Rechtsanwalt | Partner
Reed Smith LLP