



POLISH BANK ASSOCIATION

Polish Bank Association's comments on the European Data Protection Board's "Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data"

Warsaw, December 2020

Introduction

Polish Bank Association welcomes the proposed *Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data* (hereinafter referred to as the "Recommendations") as a mean for helping data exporters with the task of assessing third countries and identifying appropriate supplementary measures where needed.

At the same time, Polish Bank Association would like to use the ongoing public consultation as an opportunity to comment on the Recommendations and present its following remarks.

Comments

a) Chapter 2, section 2.3

Step 3: Assessment 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

The EDPB stresses that when carrying out this assessment controllers should „*pay specific attention to any relevant laws, in particular laws laying down requirements to disclose personal data to public authorities or granting such public authorities powers of access to personal data*” (paragraph 36).

Since data importers are not legally obliged to provide EU data controllers with the relevant information relating to the third country in which they are established, the additional help may be needed to prepare the required analysis with a due diligence. While big business players are likely to invest in professional legal advice from law firms competent in providing legal support under third-country law, small and medium businesses that are willing to transfer data outside EEA (e.g. move to the cloud) have no operational neither financial tools to follow step 3.

Also, since the burden of evaluating various aspects of third countries' legal system is on data controllers (on each of them independently) the outcome of assessment concerning e.g. US

legal system will likely differ among data controllers depending on in-house criteria being in place. We believe that the lack of a unified approach concerning third countries is not for the benefit of the certainty in the area of international data transfers.

Moreover, the legal system in the country of the data recipient may be complex (for example, the US law consists of both federal and state law regulations). In such case, it is unclear, what aspects of such legal systems should be taken into consideration.

b) Chapter 2, section 2.4

Step 4: Adopt supplementary measures

The EDPB does not give any recommendations as regards the supplementary measures in case of the transfer within the same group of undertakings. For example, technical and organizational solutions may be similar both for the UE and non-UE entities – it is unclear whether such similar solutions may be deemed as supplementary measures.

c) Chapter 2, section 2.5

Step 5: Procedural steps if effective supplementary measures are identified

The EDPB noted that the precise impact of the Schrems II judgment on BCRs and ad hoc contractual clauses is still uncertain and declared that it will provide additional comments as soon as possible on whether any additional commitments may need to be included in the BCRs (paragraphs 59 and 61). We are then awaiting any guidance issued by the EDPB in this regard.

d) Chapter 2, section 2.6

Step 6: Re-evaluate at appropriate intervals

It would be recommended to further develop and provide more details within the current step 6 (paragraphs 62-63). An optimal solution could include monitoring of developments in third countries' legal systems (at least as regards most popular jurisdictions) performed by the EDPB or local supervisory authorities. Imposing the responsibility for monitoring and knowing the law of a third country solely on the data exporter is a significant encumbrance for such an entity. Furthermore, possible solutions could also include making the data importer responsible – at least to some extent – for informing the data exporter about such developments in a given third country. In that respect, such a solution could consist in joint liability of a data importer or other obligation of a data importer – for example, by a mean of standard contractual clauses.

e) Annex 1 to Recommendations

The Recommendations do not include the definition of the transfer of personal data. Although the common, general meaning of this term is known and understood, it would be nevertheless useful and more precise to provide such definition, especially that currently - according to the EDPB – even a remote access to data is considered as a form of transfer (see paragraph 90).

f) Annex 2 to Recommendations

Scenarios in which no effective measures could be found

The EDPB exemplified cases where no effective measures could be found. One of them is the scenario in which a data exporter makes personal data available to entities in a third country to be used for shared business purposes, i.a. case where a controller established on the territory of a Member State is transferring personal data to a processor in a third country belonging to the same group of undertakings (paragraph 90 and next). **The EDPB is of a view that an effective technical measure is unavailable where:**

“1. a data exporter transfers personal data to a data importer in a third country by making it available in a commonly used information system in a way that allows the importer direct access of data of its own choice, or by transferring it directly, individually, or in bulk, through use of a communication service,

2. the importer uses the data in the clear for its own purposes,

3. the power granted to public authorities of the recipient country to access the transferred data goes beyond what is necessary and proportionate in a democratic society,

then the EDPB is incapable of envisioning an effective technical measure to prevent that access from infringing on data subject rights.”

It is not fully clear whether the above scenario occurs where circumstances discussed in points 1, 2 and 3 exist cumulatively.