

Schrems II - Recommendations 01/2020

December 21, 2020

The European Data Protection Board
Submitted at edpb.europa.eu

ICT-Norway: Feedback on the Recommendations 01/2020

ICT Norway is an independent interest group for the Norwegian ICT industry. We represent the full range of the spectrum, from the major players down to small entrepreneurial companies. For more information about us, please visit <https://www.ikt-norge.no/english/> or get in touch.

Privacy and protection of individuals' data is of crucial importance. Not only is it essential in order both to safeguard fundamental rights, and to ensure trust in digitalising society for the benefit of all. It is also a prerequisite for ensuring long term sustainability and competitiveness of ICT businesses. The high level of protection afforded by the GDPR has been an important step in future-proofing the digital economy. The industry, and society as a whole, has invested vigorously in complying with existing and new requirements since its entry into force.

The Schrems II judgement by the Court of Justice of the European Union illustrates that European citizens enjoy strong protection, which can and will be enforced irrespective of national borders. This is appropriate and necessary in a global digital economy. In this global digital economy, however, data transfers across jurisdictions is an essential component of innovation, trade and collaboration, and the ecosystems which support the multitude of digital products and services we all rely on.

While we strongly support effective enforcement of the GDPR, and indeed would welcome a higher level of engagement from enforcement authorities both relating to guidance, proactive compliance efforts and enforcement, we are apprehensive that the practical consequences of Schrems II, and in particular, the recommendations of the European Data Protection Board, may disrupt important infrastructure of the digital economy. This will have wide-reaching consequences, and leave especially small- and medium sized businesses with an excessive burden.

We note that for some European businesses, this disruption of data transfers to third countries can provide an opportunity to innovate and compete on the parameter of being able to provide their services from within the EEA. A larger variety of European

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alternatives should be welcomed, and hopefully will contribute to a market with increasing innovation and choices, where also the aspect of geographic locality may be of importance to some customers while making their choices between different providers. It is, however, of fundamental importance to trade, innovation and collaboration that these developments occur on a level playing field - which is open to all who play by the rules. The best offers and options should be allowed to compete against each other on fair terms, globally. This is not only a requirement for being able to harness the benefits of global technological development for Europe, but also for a global market which is open to European technology, businesses, and values.

Facilitating data transfers - with a high level of protection in accordance with the GDPR - is in principle important in relation to any third country. Having regard to the importance of many USA-based companies in the digital economy, however, we strongly urge the European Commission to prioritise reaching a swift and sustainable agreement in order to be able to ensure an adequate level of protection for European citizens' data in the US, and to reinstate a decision on adequate protection in accordance with GDPR, which may be relied upon by relevant players in the market.

The high practical importance of other transfer tools, notably Standard Contractual Clauses, causes the Schrems II judgement to heavily impact the European ICT industry notwithstanding an eventual new adequacy decision regarding the USA. Clarifications on the practical implementation of the interpretations laid down by the Court in Schrems II is not only needed by the ICT industry, but indeed by all sectors relying upon ICT services. In this regard, we support actions that contribute to clarify rights and obligations pursuant to the GDPR, as the EDPB has set forward to do with the recommendations. We are, however, of the opinion that modifications should be considered in order to ensure their effectiveness in implementing supplementary measures in accordance with Schrems II, in a proportionate and practicable manner.

We are worried that especially for small and medium-sized organisations, the assessments which are envisioned by the recommendations may prove to be extensively burdensome. Therefore, we believe the recommendations should be reviewed with the real-life resource situation for data exporters across Europe in mind. For instance, we would recommend clarifying the scope of entities involved in a transfer which should be included in an assessment, in addition to clarifying that risk assessments may be conducted prior to uptake of a service which will include transfers, and not necessarily in connection with every individual data transfer. Furthermore, a more holistic and flexible approach should be considered:

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Risk-based approach

- The recommendations seem to go far in the direction of prescriptive and detailed requirements.
- A more risk-based approach would allow data exporters to consider all relevant circumstances that have bearing on the risks associated with a third country data transfer - including the likelihood of access by third country governments.

Contractual and organisational measures

- A data importer's commitments, such as to challenge government requests, ensure transparency and adherence to certain standards, should be able to be taken into account in addition to technical measures.
- The recommendations should avoid being interpreted as to preclude that on a case-by-case basis, a holistic and diligent risk assessment may conclude that contractual and organisational measures may be sufficient to ensure essentially equivalent protection - if this is indeed the case after a diligent assessment. The use cases in Annex II should be reviewed in this regard.

Sincerely yours,

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