

Public Consultation

The Swedish Trade Federation

The Swedish Trade Federation is a trade and retail organization that represents 9,000 small, medium and large companies with approximately 300,000 employees.

Today, we experience a competitive online environment. Only companies that use the most personal, fastest, and safest digital services will be able to keep their consumers. EU retail companies witness that such front-end digital services often are offered by service providers located in countries outside EU. Thus, for the retail sector, data transfers are an important mechanism to deliver a great and personal service to all European consumers. As the EDPB surely already is aware of, the Schrems II ruling has had an adverse impact on the Swedish retail sector. In order to not impede EU retail companies' competitiveness and digital innovation, the data subjects' fundamental rights and freedoms *must* be balanced with the need to encourage and stimulate digital innovation and entrepreneurship when adopting new recommendations. It is fundamental that EU companies have access to clear and practical guidance, and that such guidance allows for the use of services from third countries. Therefore, we cannot stress enough how important it is to have a progressive and practical approach in the recommendations; both for the business climate and for the data subjects.

Please find below our contribution to the consultation.

Summary

The Swedish Trade Federation welcomes the EDBP draft Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data and Recommendations 02/2020 on the European Essential Guarantees for surveillance measures and its efforts to clarify data

protection issues related to the legal requirements for transfers to third countries in light of the Schrems II judgment.

It is important that we find a common interpretation among the member states within the EU and withing the DPAs. It is also central that the implementation is harmonized, and we welcome cross-border co-operation between the data protection supervisory authorities.¹

The Swedish Trade Federation supports the disposition of the recommendations and notices and appreciates that the EDPB has made efforts to make it easy to use for companies. The methodology presented in the Recommendation on supplementary measures is similar to the compliance work performed by organizations. However, we do have some important concerns regarding the requirements set forth in the recommendations.

Our six main messages and concerns for the EDBP:

1. **The rules and obligations are impossible to follow for companies and organizations.** The requirements stated in step 3 are extensive and will lead to fragmented data protection for the data subjects. The requirements set forth in step 3 are extremely burdensome for data controllers and the Swedish Trade Federation is worried, and convinced, that companies (especially SMEs) do not have the resources nor knowledge to be able to carry out the required assessments.
2. **The guidelines goes beyond the requirements of the GDPR resulting in severe disadvantages for EU companies' competitiveness and digital innovation.** We note that the EDPB does not consider the requirements in GDPR and the Schrems II judgment to have a risk-based approach when determining *if and what* supplementary measures that may be required. The Swedish Trade Federation requests that the EDPB clarifies that the transfer tool under Article 46 alone, depending on the processing of personal data, could satisfy the requirement of an “essentially equivalent level of data protection”.

¹ CJEU have acknowledged that this balancing exercise may result in variations between countries, depending on the weight afforded to each applicable right, including the right to privacy and the right to freedom of expression. (**GOOGLE LLC V CNIL (N 1), PARA 60**).

3. **There is a risk that the recommendations create fragmentation between member states and lower the protection for the data subjects.** According to the Swedish Data Protection Authority there is a mutual understanding on how to approach the supervision, but there is no clear agreement on how to harmonize the DPAs supervision in case of a non-compliant transfer. For example, it has been brought to our attention that some DPAs issues a warning if they do not agree on the assessments made by a company whereas other DPAs issues an administrative fine based on the fact that the assessment was wrong. The Swedish Trade Federation asks for full harmonization in the DPAs' supervision. This is important to create legal certainty, for companies and data subjects, which is a fundamental principle in all legal systems.
4. **The technical measures are unrealistic and explained in a too general way which leads to confusion.** The Swedish Trade Federation welcomes the efforts to explain the supplementary measures based on use cases. Thus, we find these too general and hard to translate to the practical work.

Instead, we would ask the EDPB to describe the different supplementary measures in relation to actual services that are used by millions of data controllers around the EU, for example email services, analytic tools, marketing services etc. Straight forward examples on these tools would help the controllers in a better way and it would consequently also increase the level of protection for the data subjects.

5. **This can hinder innovation, lead to competition disadvantages and influence the data protection within EU in a negative way.** If the practical compliance work related to the GPDR becomes too difficult for EU organizations and companies, there is an imminent risk that this creates confusion and frustration among the actors. This can adversely affect the motivation to develop new, innovative and more secure services, which ultimately must be the goal for the EU legislator. It also risks the competitiveness for EU companies. If the services, for example e-commerce websites, become unmodern and do not live up to the expectations of the consumer, the consumer will instead shop and visit webpages from companies and organizations outside EU. This will of course lower the protection for the data subjects even more, which clearly cannot be the purpose of the regulation.

6. **We are convinced that a higher level of data protection can be reached if changes are made to the standardized services offered on the market.** As communicated before, the Swedish Trade Federation wants the EDPB to acknowledge the fact that most services provided on the market today are offered on a standardized basis. SMEs have no possibility to demand changes to the services, and even the big retail companies have almost no opportunity to affect the development of the services. In addition, there are no other competitive options available on the market. We understand that data subjects' rights need to be the central key of the compliance work. However, the biggest impact for the data subjects can be reached if changes are made directly to the services by the service providers. Therefore, the Swedish Trade Federation, ask the EDPB to take initiatives for a dialogue with the great tech companies that provide the services that so many companies rely on today. Otherwise, we will not see the change that is needed in the light of the Schrems II ruling.

General remarks – Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data

Extensive burden on company resources to assess the circumstances relating to a specific transfer

The Swedish Trade Federation welcomes the series of steps presented in the recommendation which data controllers may follow before transferring personal data to a third country. In step 3, the EDPB clarifies that the data controller is responsible for assessing the level of data protection offered by the third country with the aim to ensure that such level is essentially equivalent to that in the EU. We note that the data controller needs to consider and assess, not only the legislation of the third country, but also information from the sources set out in Annex 3. The burden to conduct the assessment is placed on the data controller. The requirements set out in step 3 together with the principle of accountability present great challenges for the data controller, *inter alia*, because:

- EU companies faces global competition requiring the use of new and innovative services to stay competitive on the market;
- many of such services are based in a third country and provided as a standardized basis with no, or very few, possibilities to

demand requirements in the form of supplementary measures to be implemented by the service provider;

- the contracts are also standardized and there is often no room for negotiations, in other words the services are offered on a take-it-or-leave-it basis;
- there are often very few other *equivalent options*² available to the data controller when choosing a service provider to fulfil the intended purpose of the processing;
- consumer behavior has changed, and consumers are today just as likely to purchase their products from a non-EU company;
- the resources available to conduct a proper assessment as set out in the recommendation are very limited; and
- the assessment is of a complex nature and it can be questioned if the data controller is the most appropriate party to conduct such assessment.

The Swedish Trade Federation is concerned that very few companies will have the resources to conduct proper assessments as set out in the Recommendations. To achieve an appropriate level of protection for data subjects' rights, it is preferable if the assessment is conducted by relevant EU public entities resulting in clear guidelines for companies to follow to be able to rely on such assessment. The Swedish Trade Federation is convinced that such a practice would strengthen both data subjects' rights and EU companies' ability to compete on a global market.

The use cases do not sufficiently explain when the various supplementary measures set out in the use cases are sufficient in relation to a specific processing activity (compare with the factors to consider in the assessment set out in paragraph 33)

According to step 3 of the Recommendation, a data controller must assess the third country's legislation, including the information set out in Annex 3. The outcome of the assessment and other circumstances relevant to the transfer will have an important impact if and what

² By equivalent options, the Swedish Trade Federation e.g. considers the security measures, such as technical and organizational measures, implemented in the service, and the intended results when using the service.

supplementary measures that are required to be able to go through with the transfer. As stated para 74, the use cases only consider the fact that access to transferred data by public authorities in third countries does not impinge on the effectiveness of the appropriate safeguards contained in the Article 46 GDPR transfer tools and applies even if the authorities' legal access goes beyond what is necessary and proportionate in a democratic society.

The Swedish Trade Federation welcomes further clarifications regarding how other circumstances, especially those set forth in paragraph 33 of the recommendation, relating to the transfer could affect the potential use and sufficiency of the supplementary measures set out in the recommendation.

Finally, The Swedish Trade Federation would like to bring up the fact that the DPAs are already starting with supervision. We have had dialog with both the commission, the EDPB and the Swedish DPA to give clear advices to our member companies. All the institutions mentioned have referred to the coming guidelines and that they will help the companies to do the right thing. It is therefore remarkable that the Swedish DPA for example starts the supervision before the consultation is not even over. Consultations should not only be a tick in the box and a formal procedure, we expect that the comments from different organizations, that are have insights in the practical challenges, are taking into consideration before any supervision. It is in all our interest to make it possible in practice for companies and organizations to protect data subjects' fundamental rights and freedoms.

This opinion has been decided by the Head of Public Affairs, Mats Hedenström. The rapporteurs have been policy expert and lawyer Sofia Stigmar. Linda Leffler Olsson, policy expert and lawyer, has also participated in the final proceedings.

SWEDISH TRADE FEDERATION



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