Liberty Global's position regarding the new landscape for International Data Transfers

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Liberty Global welcomes the opportunity to participate in the EDPB's public consultation on the Recommendations 01/2020 on the supplementary measures, since International data transfers are a fundamental part of the connected global economy, that allow companies to provide more competitive and innovative services to consumers, since it allows:

- Procuring supplies and services from the most competitive vendors in the global market;
- Managing international workforces across the multinational companies' footprint.

From a legal perspective, the GDPR (art 46) allows companies to rely on **Standard Contractual Clauses** for these necessary international transfers, and they have been doing so since the first model clauses Decision was adopted by the European Commission, in 2001.

The CJEU in its Schrems II Decision (July 16th) invalidated the protection provided by the EU-US Data Protection Shield. However, it considered that Commission Decision 2010/87 on standard contractual clauses for international data transfers is **still valid**.

The EDPB has recently interpreted Schrems II and issued Recommendations on measures to supplement transfer tools that apparently result in transfers of personal data outside the EEA only being possible with encryption or prior pseudonymization where the third country law doesn't ensure an equivalent level of protection to the one in the EEA. Which, in practice, means that personal data can only be exported for very limited use cases where the supplier can provide services without needing access to the data such as storage, backup and similar, limiting the choices of providers and hence competition and innovation.

This approach is contrary to the GDPR, according to which the whole data protection framework takes a **risk based approach**. In fact, the **EDPB endorsed article 29 working Party's "Guidelines on DPIAs and determining whether a processing is likely to result in a High Risk**", according to which DPIAs are only mandatory when the processing is "likely to result in a high risk to the rights and freedoms of natural persons, considering the use of new technologies, and taking into account the nature, scope, context and purposes of the processing (Article 35(1) GDPR)[1]. This risk based approach is not taken into account in the EDPB's Recommendations, resulting in the contradictory requirement to conduct a Transfer Impact Assessment for any transfer of personal data, including processing activities that otherwise wouldn't even be subject to a DPIA. If the Transfer Impact Assessment then shows that public authorities could in theory access the personal data according to the third country law, and protection to rights and freedoms is not guaranteed on an equivalent level as in the EU, **the guidelines basically impose in point nr. 48 a ban to transfer the personal data** (unless they

[1] To be considered high risk processing activities they should involve automatic decision making, profiling, processing of large volumes of sensitive data or a systematic monitoring of a certain area.

are encrypted or pseudonymised, which highly limits their usability), **even if there would be no or low risk for the relevant individual.**

The **new draft Standard Contractual Clauses** do factor in a risk assessment taking into consideration (i) the specifics of the transfer, e.g. the nature of the personal data transferred etc; (ii) the third country laws including access rights by law enforcement in the third country and (iii) any additional technical and organisational safeguards (see Clause 2(b)); and not just the third country laws.

It should be noted that the CJEU's decision in **Schrems II should be read in the context** of the case where it was adopted: the transfer of behavioural profiling data by Facebook to the US. This was clearly a High Risk data processing activity.

With the **EDPB's approach** there will be many processing activities that should be immediately stopped because they involve an international transfer. Such transfers will be stopped even when they wouldn't result in a risk to rights and freedoms of data subjects.

This proposal will result in a high impact on many EU companies' costs and competitiveness.

It is Liberty Global's view that the EDPB should **replace its blanket ban with a proportionate, risk based approach** allowing international transfers based on SCCs where the risk to European data subjects is low or appropriate.

In addition, the EDPB's Recommendations are placing on private companies the task of performing full assessments to determine the extent to which a third country can guarantee an equivalent level of protection to the one in the EU. This is a disproportionate and costly burden, that will lead to inconsistencies and legal uncertainty for data exporters and data subjects .

Bearing this in mind, we believe that the EDPB should request information from third country DPAs about the level of adequacy of each of their legal systems, and elaborate a '**white list' to support exporters with their assessments on a harmonized way**, for the sake of legal certainty.

Although the Court of Justice states in Schrems II that international transfers to countries with an insufficient level of protection should immediately stop, the DPAs should be consistent with the appearance of legitimate confidence that has been created by the fact that they never questioned SCCs as a sufficient mechanism before.

Therefore, **sufficient grace periods** (of for example two years) should be applied by the DPAs in order to allow companies to implement this new framework, and the EDPB should seek their alignment in this regard.

This is similar to the case of the UK, in case no adequacy decision or equivalent tool is adopted after **Brexit:** There is an inconsistency between the fact that the UK has been

considered to be a safe place only because of being part of the EU, and the possibility of not being safe anymore immediately after leaving the EU. This inconsistency should be compensated by the grace period mentioned in the previous point for the UK more than for any other country, and the EDPB should seek alignment from the DPAs on this.