

**Written observations by the Dutch  
government on the draft-  
Recommendations 01/2020 on  
measures that supplement transfer tools  
to ensure compliance with the EU-level  
of protection of personal data**

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In the above-mentioned matter, the Dutch government has the honor of bringing the following comments to the attention of the European Data Protection Board (EDPB).

1. The Dutch government compliments the EDPB for the efforts made to formulate elaborate guidelines in a short time frame on the transfers of personal data to third countries taking into account the decision of the Court of Justice of the European Union (EU Court of Justice) in the ‘Schrems II’ case.
2. The Dutch government welcomes the Recommendations of the EDPB, which are an essential step towards improving legal certainty in the aftermath of the decision of the EU Court of Justice in the ‘Schrems II’ case.
3. The Dutch government observes that, in line with the decision of the EU Court of Justice and the draft Standard Contractual Clauses for the transfer of personal data to third countries of the European Commission (SSCs), the EDPB Recommendations make clear that, when evaluating if the transfer tool and its safeguards are effective, the parties should take the context and the characteristics of the transfer(s) into consideration<sup>1</sup>. Data transfers may indeed take many shapes and forms, involving various types of data, different processing purposes and recipients, etc.

The Dutch government notices, however, that some sections of the Recommendations seem to limit the possibilities for parties to fully incorporate the context of the transfer into their assessment.

In that regard, the Dutch government points to section 42 of the Recommendations. It states that in the absence of publicly available legislation, one should look into other

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<sup>1</sup> See for instance, chapter 2.3 concerning Step 3, specifically sections 30, 32, 33 and 49.

relevant objective factors and not rely on subjective factors such as the likelihood of public authorities' access to the data. This provision seems to state that companies are not allowed to factor the risks of government access to (specific types of) data into their assessment, meaning that they may have to take more stringent measures without being able to differentiate between different types of data.

The Dutch government agrees that factors on which the parties rely to be objectivized with documents and other sources. However, in the opinion of the Dutch government, it may not be in line with the GDPR and might go beyond the ruling of the EU Court of Justice to prohibit parties from considering tangible risks of government access or requests for disclosure that are based on well-grounded and documented past experiences with such access or requests.

In this context, the Dutch government wants to underline that the current wording of paragraph 42 does not seem in line with recital 20 and Clause 2, under b, of the above-mentioned draft-SCCs of the European Commission. Recital 20 and Clause 2 explicitly refer to 'any relevant practical experience with prior instances or the absence of requests for disclosure from public authorities received by the data importer for the type of data transferred' as examples of circumstances of the transfer that Parties can take into consideration in their assessment. In addition, the examples of sources listed in Annex III or paragraph 43 of the Recommendations appear to be more limited in their scope than the text of the SCCs.

To avoid more legal uncertainty on the conditions of international data transfers, the Dutch government urges the EDPB to clarify the text of the Recommendations on this issue and suggests aligning it with the above passage of the SCCs.

4. The Dutch government welcomes the practical examples of supplementary measures listed in Annex II of the Recommendations.

It notices that the examples of contractual and organizational measures are (open) examples of measures that parties may take including conditions for effectiveness of the measures, which leaves room for parties to take either the measures listed by the EDPB or (slightly) different measures depending on the specific circumstances of the transfer. The examples of technical measures however reflect a different approach.

Besides examples of (open) use cases (use cases 1 to 5), the EDPB also lists, under sections 87 to 91 (use cases 6 and 7) examples of situations and related measures that, according to the EDPB, will not give sufficient protection and therefore would not qualify as supplementary measures. This statement does not leave any room for the parties to determine – based on their assessment of the specific circumstances of the transfer – whether in such situations (other) measures would adequately safeguard the transferred data.

The Dutch government finds it difficult to reconcile the aforementioned approach with the overall case-by-case or contextual approach of the Recommendations, which is in accordance with the GDPR and the decision of the EU Court of Justice in Schrems II. As this approach and assertion entails a pre-ante judgement, which in advance precludes the possibility of performing any (risk) assessment in relation to the situations described in these examples.

Furthermore, the Dutch government observes that the aforementioned approach regarding use cases 6 and 7 seems incongruent/not in line with the approach followed by the European Commission in the draft-SCCs. The Dutch government wants to strongly emphasize the importance of establishing well-aligned instruments in this matter.

5. As a general remark, the Dutch government wants to emphasize that the Schrems II-ruling puts a great burden on organizations, especially SME's. They have to perform an extensive assessment of the legislation and practices of third countries to determine whether the safeguards in the transfer instruments are sufficient or whether they need to take additional measures, as ruled by the EU Court of Justice. Such analysis also has to be monitored and re-evaluated. Although the necessity of a performing an assessment of the situation in the third country is not new, it has taken a new dimension because of the Court's ruling.

It is therefore of great importance that the applicable framework for international transfers is as workable and practical as possible, as to avoid unnecessary burden.

6. As a final remark, the Dutch government would like to point out the fact that the rulings of the EU Court of Justice lead to difficulties in the possibilities for transferring data, specifically to the United States, and for the business industry in general. In this perspective, the Dutch government wants to emphasize the importance of ongoing international

initiatives and negotiations for the protection of personal data in general and for ensuring the continuity of the level of protection afforded under the GDPR.

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