



TECHNET
THE VOICE OF THE
INNOVATION ECONOMY

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December 21, 2020

The Honorable Andrea Jelinek
Chair
European Data Protection Board
Rue Wiertz 60
1000 Brussels
BELGIUM

Re: TechNet comments regarding proposed recommendations on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data (R01/2020)

Dear Chairman Jelinek:

TechNet appreciates the opportunity to provide its views in response to the European Data Protection Board's (EDPB) November 10, 2020 Recommendations on Measures that Supplement Transfer Tools (Recommendations). TechNet respectfully requests EDPB reconsider the Recommendations and provide proportionate tools for data transfers to businesses that are consistent with the General Data Protection Regulation (GDPR) and the Court of Justice of the European Union's (CJEU) ruling in case C-311/18.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. Our diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over three million employees and countless customers in the fields of information technology (IT), e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance.

We thank the EDPB for its efforts to provide certainty to businesses across the world who trade with European partners. Cross-border data flows are critical to the day-to-day activities of individuals, businesses, and governments alike and are vital drivers of the transatlantic economy. The United States and European Union (EU) are each other's most important commercial partners when it comes to digitally-enabled services. The two are the largest net exporters of digitally-enabled services to the world and bilateral U.S.-EU data flows in research and development are the most intense between any two international partners.

We write to convey our concerns that, as currently drafted, the EDPB's draft Recommendations would severely restrict global data flows, which would have a significant, harmful impact on the economy and people's lives. In TechNet's assessment, the Recommendations amount to a de facto data localization requirement for EU personal data. Specifically, the Recommendations' annexes contradict previous guidance and would seemingly prohibit the transfer of any personal data to "unsecure" third countries unless prescriptive technical measures imposed by the EDPB guidance are implemented.

This will have a significant negative impact on businesses attempting to operate between the EU and the majority of international partners, including the United States. Cross border data flows are necessary for everything from seemingly routine tasks, such as personnel administration and other human resources-related activities within corporate organizations, to the operations and management of cloud and other IT services.

As the underlying concern in the *Schrems II* decision is U.S. government surveillance laws and practices, we have two main concerns regarding the guidance:

- First, step 3 requires a case-by-case analysis of objective factors. The guidance explicitly states subjective factors such as the likelihood of public authorities' access to data in a manner not in line with EU standards should be avoided. This step puts a significant burden on all companies, but start-ups and small businesses will be particularly challenged by this requirement. Additionally, this creates a one-size-fits-all approach that puts the same burden on companies at low or no risk of being subject to the type of government access at the heart of the CJEU's concern. This burden also comes with little to no benefit to the data subject. The EDPB can remedy this concern and take a risk-based approach that enables companies to consider all relevant risks, including the likelihood of government access.
- Second, step 4 requires companies to identify and adopt supplementary measures. The proposed measures rely largely on prescriptive technical measures that may not be appropriate in all contexts. Determining which supplemental measures to implement should consider the context of the transfer, whether the control is reasonable in proportion to the risk, and the technical feasibility of implementing the control.

Our recommendations stated above are consistent with the goals of the GDPR and CJEU's ruling in case C-311/18. In particular, the GDPR, in Chapter V and Article 46, respectively, recognizes the contextual nature of data transfers and requires data controllers to choose appropriate safeguards for data transfers out of the EU. Further, Article 32 stipulates that measures to secure personal data should be selected on the basis of a risk assessment. Finally, in case C-311/18, the CJEU's

ruling maintains that data controllers must make case-by-case assessments and that all the circumstances must be considered in deciding to proceed with a data transfer. In contrast, the EDPB's Recommendations seek to apply a broad approach to extra-EU data transfers that would exclude common practices such as Standard Contractual Clauses (SCC) that heretofore have met the intent of both the GDPR and the CJEU's aforementioned ruling. To comply with the Recommendations in essence would then require implementation of measures prohibiting personal data transfers outside of the EU to subjectively determined "unsecure" third countries.

As such, TechNet encourages the EDPB to reconsider its Recommendations and amend them to be consistent with the proportionately and risk-based approaches contained in the GDPR and reaffirmed in the CJEU's ruling in case C-311/18. More fundamentally, adopting a risk-based approach and a case-by-case assessment will ensure that appropriate safeguards are applied to certain types of information and allow for continuity of operations for businesses with locations in the EU and abroad, as well as for IT services in general.

Thank you for your consideration of TechNet's views on this matter. We appreciate and respect the EDPB's role in providing guidance concerning data transfers and hope it will incorporate our views into a subsequent revision of the Recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Linda Moore". The signature is written in a cursive, flowing style.

Linda Moore
TechNet President and CEO