



Dr. Andrea Jelenik  
Chair, European Data Protection Board  
Rue Wiertz 60  
B-1047 Brussels  
Belgium

Re: EDPB Recommendations on Supplemental Measures for Data Transfers

Dear Dr. Jelenik:

We are writing in response to the European Data Protection Board's (EDPB) recent recommendations on supplemental measures for data transfers. While we appreciate the EDPB's efforts to provide guidance on continued use of the Standard Contractual Clauses (SCCs) following the European Court of Justice's ruling in the Schrems II decision, the recommendations pose both procedural and substantive concerns.

The EDPB originally proposed an extremely short consultation period of 19 days and, subsequent to feedback from U.S. and European stakeholders, has extended the deadline to December 21. With consultations in some cases having lasted up to 12 weeks, the timeframe for consideration remains rushed in light of the unprecedented disruption of the COVID-19 pandemic. In addition, given the complex subject matter of the consultation and potentially significant economic implications, it is important that the EDPB meaningfully evaluate input from impacted parties that have both operational and technical expertise to share, especially if that input differs from the recommendations as drafted.

With respect to the substance of the recommendations, we are concerned that they are overly prescriptive in light of the Schrems II decision. In Schrems II, the Court held that the SCCs remain valid and that supplementary measures need to be assessed on a "case-by-case" basis in light of the data transferred. Yet the recommendations can be interpreted as treating all transfers to a given country the same, without accounting for the nature of the data transferred or the likelihood of government access. This approach is, itself, inconsistent with the approach proposed by the European Commission in its proposed updated Standard Contractual Clauses, which permit data exporting and importing parties to take into account "*the specific circumstances of the transfer, including... the scale and regularity of transfers;... the type of recipient; the purpose of processing; the nature of the personal data; 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;*" (Clause 2(b)(i)). A closer alignment should be achieved between the European Commission's proposed updated Standard Contractual Clauses and the EDPB's recommendations. Moreover, the EDPB recommendations can be interpreted to require technical measures that make government access nearly impossible, without any consideration of the effectiveness of contractual protections. We urge the EDPB to adopt a risk-based approach, consistent with GDPR, that recognizes that certain categories of data, such as communications between companies and their customers for customer support purposes, are highly unlikely to be of interest to government authorities and thus subject to access.

Data protection is a fundamental right, but as with any right the required protections must be evaluated against the realistic risks. This is particularly true given the economic importance of trans-Atlantic data flows, which according to a recent [CSIS article](#) are worth about \$7.1 trillion annually. An effective, pragmatic approach is required to ensure the continued success of Europe's digital transformation.



Regards,

A handwritten signature in black ink, appearing to read 'JG', written over a light blue horizontal line.

John Geschke  
Zendesk, Inc.  
Chief Legal Officer & Chief of Staff

Cc: Mr. Bruno Gencarelli, Head, International Data Flows and Protection Unit  
European Commission