AMERICAN CHAMBER
OF COMMERCE IN NORWAY

Comments on EDPB Recommendations R01/2020

AmCham Norway welcomes the opportunity to provide comments on the European Data Protection Board's (EDPB) recommendations R01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data.

AmCham Norway is a non-profit, member-led organization working to contribute to information sharing, best practices, thought leadership, and private sector initiatives in order to strengthen transatlantic trade and business relations.

We are pleased that the EDPB recognizes the need for clarification of security requirements for cross-border data transfers after the Court of Justice of the European Union's (CJEU) 16 July 2020 judgement, but are concerned by the proposed restrictions. Most pressing for our members is the establishment of a renewed Privacy Shield agreement that will solidify transatlantic information and data sharing. As these discussions continue, it is of utmost importance that the EDPB's recommendations are operable and clear.

The free flow of data across borders is the lifeblood of many small and medium-sized enterprises and is crucial to the strength of the European economy. AmCham Norway endorses enhanced protections for personal data, but strongly recommends that the draft recommendations be in-line with both GDPR risk-based assessments and in support of international collaboration in recovery from COVID.

<u>Summary</u>

It is vital to protect the privacy of citizens and the security of data flows both domestically and internationally through reasonable, rules-based data guidelines. The draft guidelines published by the EDPB, while well intentioned in their aim to adhere to the highest level of security, are troubling in that they seem to disregard the practical application of, and adherence to, the EDPB's own recommendations. They show an over reliance on technical measures that, if adopted, would impact and disrupt businesses of all sizes, in every sector of the EU and EEA. While titled "recommendations," many of the provisions are drafted as if they are requirements, and as if failure to comply with them would violate EU law.

The threshold set by these guidelines largely nullifies any meaningfulness in data transfers while simultaneously making most data transfers more expensive and technically challenging, particularly for small and medium sized businesses. In an economy still reeling from the impact of COVID, businesses need to be able to engage with supply chains outside of the EU. Imposing burdens and costs on businesses while making it more difficult to access global markets could be crippling for an economy already in a state of recovery. While awaiting a renewed Privacy Shield agreement, AmCham Norway encourages a set of clear suggestions from the EDPB that can be effectively

Arbins Gate 2
0253 Oslo
Norway

Tlf. +47 22 41 50 10
www.amcham.no
amcham@amcham.no

Org. nr. 985 760 225 MVA
Member of the American Chamber network

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implemented by businesses to adhere to security regulations – without causing greater harm to their recovery while still providing for strong international collaboration. The implementation of such suggestions should be guided by a risk-based approach, and allow for a combination of measures on a case-by-case basis.

Areas of Concern

Very few countries have national security regimes able to satisfy the stringent requirements set out by the CJEU, making many of the EDPB recommendations unwieldy and their implementation unrealistic. One such dilemma presents itself in *Case 7*, in which 'the EDPB is incapable of envisioning an effective technical measure' that would act in accordance with recommendations. It is unacceptable for a data policy to be so stringent as not to have an attainable solution to such a problem. This issue highlights the complex, taxing safeguards that will be required by essentially all organizations, and specifically those with any interests outside of the EU's list of approved countries.

The draft regulations can read to be prescriptive and one-sized-fits-all rather than risk-based, which would make it more in line with GDPR regulations. This means, in practice, that the general security threshold is heightened to an extent often disproportionate to potential risk. The call for encryption that is 'flawlessly implemented' and resistant to cryptanalysis is prohibitive in that it is a strictly technical solution, unclear in definition and extremely costly to develop. As the draft recommendations require that data should be encrypted at all stages and not accessible 'in the clear' as described in Use case 6 (in order for encryption to be considered as an effective technical measure), they essentially render vast quantities of data useless. Most use of data that is common in everyday business workings, such as sending emails or texts, processing customer payments, or engaging in collaborations, requires data to be available and unencrypted at some stage of the transfer.

Due to very few countries being approved by the European Commission as having acceptable security mechanisms, and the importance of access to unencrypted data, the draft recommendations paint a very isolationist picture. If the majority of countries outside of the EU are not deemed to have adequate security precautions in place, and the suggestion that all encryption keys must be held solely in the EU is upheld, the implementation of these recommendations would lead to a significant halt in international collaboration. Limiting access to the global market and supply chains would slow innovation and economic recovery without differentiating for actual risk incurred.

Aspects of the EDPB's draft recommendations appear to suggest a range of unworkable measures that would block or significantly impair data transfers, with little (if any) added benefit for EU data subjects. If the EDPB imposes significant hurdles on the use of the SCCs (and other measures under GDPR Article 46), data exporters may well try to rely on the derogations set out in Article 49 of the GDPR – which include very limited safeguards to protect EU data subjects.

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The draft recommendations in their current form may also lead to conflicts with competing EU interests. Such recommendations that suggest the implementation of technological measures to impede law enforcement and national security authorities' access to data will impact all surveillance measures – including those that may be compliant with EU law and include appropriate limits for necessity and proportionality. The Council is currently working on a draft resolution on access to encrypted data for law enforcement and has recognized that law enforcement is increasingly dependent on electronic evidence. These competing EU efforts to address public security are incompatible with requirements for technology that would make all access to data technically impossible.

Moving Forward

There is space for both cross-border collaboration and data protection to be reinforced through the EDPB, but there are several steps that we view as important to take before deciding on a set of recommendations. We encourage consideration be given to the cost of implementation, the importance of cross-border transfers to the economy, and that one solution will not fit all. We support outlining a combination of safeguards and how they can be an effective way to bolster data transfer security; enhanced clarity as to the value of context and risk-assessment in determining necessary protections; and increased collaboration with the technology industry in ascertaining how to effectively build a system that can provide an adequate level of security. International data sharing and data security are not mutually exclusive and can be jointly improved through innovative steps in support of protecting the privacy and rights of citizens around the world.

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