



Position of La Poste Groupe

EDPB consultation on draft Guidelines 07/2022 on certification as a tool for transfers

La Poste Groupe is pleased to provide its input to the European Data Protection Board's (EDPB) Draft Guidelines 07/2022 on certification as a tool for transfers.

We would like to put forward some suggestions for areas where the Draft Guidelines could be improved to ensure more coherence and effectiveness in the development of these instruments.

CLEAR ALLOCATION OF RESPONSIBILITIES

Paragraph 21 of the Draft Guidelines provides that the data exporter must assess whether the laws of the relevant third country risk curbing the safeguards of the certification it intends to rely on. However, paragraph 21 also states that this responsibility may not fall on the data exporter depending on the concrete roles as controller or processor. Though the Draft Guidelines specifies that the data exporter is responsible for all provisions in Chapter V, we recommend clarifying whether the data exporter must carry out the assessment of the laws of the importing third country even when it acts as data processor.

We note also that this proposal places quite heavy obligations on the data exporter. He must ensure compliance of transfers if he wishes to use certification as a transfer tool: he is responsible for the entire transfer chain (up to the subsequent transfer).



It should be noted that most of the obligations on the exporter are in line with the Schrems II judgment of the CJEU. However, the same observation can be made and it is perhaps regrettable that a heavy responsibility for compliance of transfers to unsuitable and risky countries rests with companies.

We welcome the clarification of some of the elements to be included in the contract (or other binding instrument) between the data exporter and the data importer, such as an assurance that the importer has no reason to believe that the laws and practices of the third country applicable to the processing in question, including requirements for disclosure of personal data or measures allowing access by public authorities, prevent it from complying with its commitments under the certification, and that it will inform the exporter of any relevant change in legislation or practices.

With regard to certification criteria, the document refers to the Guidelines 1/2018 Annex 2 and the Guide to the Assessment of Certification Criteria - Addendum but provides for additional specific new certification criteria in the light of the Schrems II judgment.

Consequently, in view of the obligations on the exporter and the additional certification criteria set out above, certification will be difficult to implement, particularly when transfers are made to high-risk countries whose local legislation allows public authorities to access the data.

RISK OF DIVERGENT CERTIFICATION CRITERIA

Though EDPB's Guidelines 1/2018 aim to ensure a harmonised approach for DPAs when approving certification criteria, the flexibility available to DPAs for the creation of GDPR certifications, seals and marks may lead to unnecessary duplication and fragmentation. The current Draft Guidelines also reiterate the room for manoeuvre enjoyed by national authorities for the approval of certification criteria in the context of international data transfers. While it is important to allow for the development of certification mechanisms that address specific sectors, products/services or national needs, ensuring EU-wide harmonisation is vital to generate the scale necessary for industry to see value in certifying.

Contact us

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