

28/07/2022 Position Paper

EFAMRO and ESOMAR Consultation Response

A Response to the draft EDPB Guidelines 07/2022 on certification as a tool for transfers

This paper is submitted on behalf of:

EFAMRO the European Federation of Associations of Market Research Organisations. Founded in 1992, EFAMRO represents the interests of market, opinion and social research in Europe. Its members are national trade associations for research businesses.

ESOMAR the global voice of the data, research and insights community since 1947, it promotes the value of market, opinion and social research and data analytics.

1. About Market, Opinion and Social Research

1.1. EFAMRO and ESOMAR represent the data, research and insights sector, accounting for in Europe a reported annual turnover of €20.87 billion.¹

1.2. Market, opinion and social research is the systematic gathering and interpretation of information about individuals or organisations using the statistical and analytical methods and techniques of the applied social, behavioural and data sciences to gain insight or support decision making. It involves systematic study of different spheres of society, politics, and the economy. Research, insight and analytics stand at the heart of all well-informed commercial, social and political decisions. Insight into what makes a product, business initiative or government policy work is often the hidden – yet defining – factor between success and failure. It is our sector that provides the deeper intelligence needed for our world today.

1.3. Many research and analytics providers subscribe to established self-regulation schemes that enable research respondents and participants to enforce their rights. These are built on established international standards set forth by the ICC/ESOMAR International Code and national codes across many EU countries.

¹ ESOMAR Global Market Research Report, which includes contributions from national associations including EFAMRO members:
<https://esomar.org/global-market-research-report>

2. Purpose of our Response

2.1. Our associations are responding to the European Data Protection Board's (EDPB's) proposed Guidelines 07/2022 on certification as a tool for transfers, which aim at providing guidance as to the application of Article 46 (2) (f) of the GDPR on transfers of personal data to third countries or to international organisations on the basis of certification (hereinafter the "Guidelines").

2.2. While our associations largely support and welcome the guidance, we wish to receive further clarification regarding the binding and enforceable commitments of the controller and processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights.

3. Detailed Feedback

3.1 With regard to clause 4 of the Guidelines, we wish to receive further clarification concerning the binding and enforceable commitments which the controller and processor in the third country need to apply to ensure appropriate safeguards for the international transfer. For the sake of clarity, we invite the Board to amend clause 4 to include a non-exhaustive list or examples of such binding and enforceable commitments.

3.2 With regard to clause 12 of the Guidelines, we believe that the guidance provided on the liabilities and obligations of Certification Bodies is unclear. This is the case, for example, when granting of a certificate should not have occurred due to subsequently discovered inadequate arrangements. Similarly it is not clear what the Certification Bodies liabilities would be if they relied upon local experts or establishments (i.e. subcontractors for elements of the audit and/or certification) and these activities were subsequently found to be inadequate for the granting of certification. How much liability would be placed upon the Certification Bodies for their activities and those of their 'local expert' suppliers? We believe it is important for the liabilities of Certification Bodies and their local experts/subcontractors to be understood in order for organisations to determine whether they wish to either be Certification Bodies and/or be local experts providing certification services to Certification Bodies.

3.3 With regard to clause 17 of the Guidelines, while welcome the Board's intention of simplifying multiple processing operations, we wish that the object of certification could include repetitive transfers as defined in EDPB guidelines 2/2018. We therefore invite the Board to amend clause 17 as follows:

*17. The object of certification can be a single processing operation or a set of operations **as in the case of repetitive transfers of personal data**. These may comprise governance processes in the sense of organisational measures hence as integral parts of a processing operation.*

3.4 With regard to clause 20 of the Guidelines, we wish to receive further clarification concerning the obligations of data exporters who want to use certification as a means of demonstrating appropriate safeguards “[...] in light of the characteristics of the intended processing [...]”. It is not clear, however, about the responsibilities if a data importer subsequently transfers data to other sub-contractors in other third countries. We wish to receive further clarification on whether the data exporter would be held responsible for determining the suitability of all subcontractors used by data importers e.g. by checking their certifications, or if such burden should lie on the data importers.

3.5 With regard to clause 46 of the Guidelines, we invite the Board to include a non-exhaustive list of such other legally binding instruments, for example codes of conducts, which could be used by controllers and processors to demonstrate their commitment in applying the appropriate safeguards to the transfer.

Research institutions and associations can make it compulsory to comply with such codes of conducts, for example by including explicit mentions to such codes in the relevant contract and/or agreements. In such cases, codes will legally oblige the parties committed to the agreement.

We therefore recommend amending clause 46 as follows:

46. As specified by the GDPR, such commitments may be taken by using a contract, which appears as the most straightforward solution. Other instruments, such as approved codes of conducts pursuant to Article 40 GDPR, could also be used, provided that these controller/processors adhering to the certification mechanism are able to demonstrate the binding and enforceable character of such other means.

3.6 With regard to Additional Specific criteria - Section 6: Dealing with requests for data access by third country authorities (pp. 15 of the Guidelines), we wish to receive a precise definition of “massive” and “indiscriminate” in the context of this guidance.

4. Final considerations

4.1 We call for additional guidance on the mutual recognition of certifications as tools for transfers. We believe that such guidance has the potential to benefit both data subjects' rights and businesses by ensuring that regulatory differences do not hinder businesses' ability to deliver products and services. Specifically, we refer to existing models such as the APEC Cross-Border Privacy Rules (CBPR) through which certified companies and governments can ensure that when personal information moves across borders, it is protected in accordance with the standards prescribed by the system's program requirements and is enforceable across participating jurisdictions.

4.2 With regard to the examples provided in the Annexes A and B, while we generally welcome such guidance, we believe that the liabilities and obligations for data importers and certification bodies remain unclear in a variety of real life scenarios. In the example provided in Use Case 3, if at the time of transfer there was no requirement to pass on cryptographic keys for decryption or authentication, but such requirement was enforced post transfer affecting the transferred data, how should the data importer and certification body behave? What would be their liabilities and obligations? We wish to receive further clarifications.

5. Next steps

5.1. EFAMRO and ESOMAR welcome the opportunity to assist the EDPB in updating and finalising the Guidance. To contact us for more information:

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