FEDMA
Federation of European Data and Marketing

Reply to Public Consultation

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

FEDMA 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.

FEDMA believes that certification, like codes of conduct, can play an important role in both facilitating and demonstrating GDPR compliance. In the context of international data transfers, the guidelines might be an important step to add another actionable instrument to further facilitate them.

Implementation must make it practical for organisations to participate in certification mechanisms, seals and marks developed under the GDPR. In our response, 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.

MUTUAL RECOGNITION OF CERTIFICATIONS ISSUED IN EEA STATES

FEDMA welcomes that the Draft Guidelines provide for the possibility for organisations to rely on certifications issued according to national approved certification schemes in EEA States as tool for transfers. Nevertheless, we regret that the Draft Guidelines do not provide for the mutual recognition of different EEA state certifications. As certifications have the potential to become a valuable instrument in promoting a consistent and harmonised application of the GDPR, barriers such as the lack of mutual recognition mechanisms for certifications issued in EEA States hinder the harmonization process and create disincentives for pan-European companies to adopt such tools. While the Draft Guidelines state that *SAs in different EEA states are free to approve the same certification mechanism for transfers,* there is a lack of clarity over the approval procedure and its requirements. In the absence of a mutual recognition mechanism, we recommend providing further guidance on approval procedures for the same certification in another EEA State, ensuring that they do not create disincentives for organisations to adopt this alternative tool for international data transfers.

LACK OF CERTIFICATION BODIES

As per the Draft Guidelines, to obtain such a certification, a company must be checked by an accredited certification body. Though we understand that the current scarcity of accredited certification bodies in EEA States is correlated to the lack – until now – of official guidance at EU level, we are concerned about the time that it will be necessary to set up such bodies as to allow organisations to benefit from the certification tool. Considering that the GDPR entered into force in 2018, it took over four years for the first GDPR certification mechanism to be introduced by a Data Protection Authority (DPA)[1]. We therefore hope that the adoption of these Guidelines, complementing the EDPB's earlier Guidelines 1/2018 on certification and identifying certification criteria, will accelerate the introduction of accredited certification bodies.

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

[1] The CNPD adopts the certification mechanism GDPR-CARPA, 27 June 2022

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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. As per Article 64(1)(c) of the GDPR, the EDPB is required to issue an Opinion on the national authority's draft decision approving the certification criteria with the aim to ensure the consistent application of the GDPR. However, as the non-binding nature of the EDPB's Opinion may limit its contribution towards greater consistency, we also recommend the creation of an EU level repository for the different certification criteria and the corresponding use-cases. Easily accessible to DPAs and organisations wishing to get certified, the repository would enhance exchange of best practices and reduce the risks of national divergence or duplication.

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. Despite the guidance provided by the EDPB and the European Commission to carry out this type of assessment, organisations still face a lot of uncertainty on the validity and compliance of their assessment over a third country's legislation, especially medium and small companies which do not have extensive legal knowledge and resources. We therefore stress the need for additional tools at EU level to facilitate this assessment.

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