

## EDPB (European Data Protection Board) Consultation Guidelines 07/2022 on certification as a tool for transfers

The consultation carried out by the EDPB on its draft guidelines on certification as a tool for transfers to third countries not benefiting from an adequacy decision is open from June 30 to September 30.

The EDPB proposes four parts intended to provide data actors with appropriate guarantees to transfer their data outside the EU based on the certification mechanism as provided for in the GDPR<sup>1</sup>.

In their answer to this consultation, companies would first like to make general comments (I) before commenting more specifically on the document proposed by the EDPB (II).

### I/ GENERAL COMMENTS

The EU's approach to data protection is followed by a growing number of third countries tending to adopt personal data protection regimes whose principles converge with those of the EU, including in the United States (cf. legislation adopted by the State of California).

This trend should lead to a new approach to the transfer of data to third countries, with the basic principle of free transfer of personal data to third countries when their legal system guarantees an equivalent level of data protection provided that public order is not disturbed.

In this context, improving the framework for these transfers primarily involves increasing the number of adequacy decisions and strengthening their provisions - starting with those to be taken under the future agreement replacing the Privacy Shield.

The reinforcement of these decisions should thus alleviate the difficulties currently encountered and limit the administrative procedures, such as those envisaged within the framework of the certifications currently open to consultation. With regard to the latter, it seems essential to harmonize the methods of implementation within the competent authorities in order to enhance their efficiency and bring safety to the various stakeholders.

- *More and prioritized adequacy decisions*

Companies want to rely more on suitability decisions rather than seeing complex certification mechanisms prosper.

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1 (Article 46(2)(f))

To do this, companies recommend establishing priorities without renouncing the imperative of an equivalent level of protection. To this end, the following orientations could be undertaken:

- finalize as soon as possible a new adequacy decision between the EU and the United States to secure the transfer of personal data held by European economic actors; in this context, companies encourage the EDPB to promote debates related to this tool within the TTC, which more generally debates EU/US cooperation under the direction of DG Trade,
- quickly adopt adequacy decisions for third countries with which the volumes of material and digital exchanges are significant (Australia, Brazil, Great Britain, India); in this sense, companies welcome the approach followed with Japan consisting of twinning the negotiations of the economic partnership agreement with the process of adopting twin adequacy decisions,
- accelerate and/or simplify the adoption of adequacy decisions with countries that not only have an equivalent level of protection but also fairly similar legal architectures, with in particular a decisive role granted to independent data protection authorities.

- *Encourage mutual recognition between authorities*

Companies note with satisfaction that the draft guidelines on certification mechanisms, based on a voluntary approach in accordance with Article 42 of the GDPR, target both data exporters and importers established in third countries.

They also appreciate that the EDPD encourages healthy competition between data importers by allowing them to avail themselves of the best certifications from data exporters.

However, they regret that the administrative and legal burdens weighing on the data exporter remain heavy, the EDPD in particular organizing a complex procedure for certification:

- the exporter is required to verify on a case-by-case basis the validity and conformity of the certification with regard to the law and practices in force in the third country (§21) and the additional measures provided by the importer envisaged by the certification (§22),
- the assessment of the certification criteria falls within the competence of the national authorities (§25),
- accreditation of certification bodies is also carried out at the national level (§26),
- the complexity resulting from these national competencies leads to the multiplication of procedures between these bodies and the national authorities (information -§ 27, agreement on the issuance of certifications -§ 28).

These by-country-certification procedures lead to a risk of dispersing the decision, a fortiori for large companies operating in many Member States and with many importers from third countries.

They recommend at least a mutual recognition procedure between supervisory authorities issuing transfer certificates in order to meet the stated objective of alleviating the constraints weighing on economic actors and securing them in their procedures. This is currently not possible under current guidelines (§30).

## II/ SPECIFIC REMARKS

Companies have carefully read chapter 3 of the draft guidelines devoted to specific certification criteria. In particular, it intends to take into account the provisions resulting from the CJEU “Schrems 2” judgment of July 16, 2020.

- *Support the risk-based approach*

In this context, the companies recall that the European Commission, like the EDPD, issued recommendations in June 2021 on transfer operations outside the EU. They leave the possibility of taking into consideration, within the framework of their analysis and their recommendations, all the tools, methodologies and internal processes already put in place by the companies carrying out daily data transfers outside the EU.

It would therefore be desirable for the EDPB to recall the possibility of using this risk-based approach, during this consultation dedicated to certification mechanisms.

- *Bring pragmatism to these draft guidelines*

If chapters 3 and 4 aim to complete the 2018 document in light of the CJEU judgment of July 2020, these draft guidelines nevertheless lack useful information for economic actors on various points.

- As for the *deadlines surrounding the certification*: it would be desirable for the examination procedure to be time framed; similarly, knowing the validity of certification would shed important light on the decision to enter or not into this certification mechanism;
- As for the need for an *update*: more information concerning the elements determining an update of the certification (would it include technological developments, or a change of subcontractor) and the actor deciding this update (the organization of certification, the supervisory authority, or the EDPD);
- As for the *costs* associated with this certification process: in order to avoid excesses, the EDPD should provide price ranges for this type of service;

Finally, this mechanism does not deal with situations experienced by certain European economic players in the case of intra-group data exchanges, and in particular in cases where the parent entity is located in the United States. It then seems difficult or even impossible to apply heavy constraints to it.

By way of illustration, it appears difficult to reconcile the recommendations of certain national authorities to keep an encryption key in Europe with the reality of constant data exchanges with the parent entity located across the Atlantic.

Initiating a certification process is becoming an increasingly cumbersome process. Companies must have a real interest in it.

This is based on:

- a small number of situations requiring certification, i.e. in the absence of an adequacy decision, the development of which is strongly desired by the actors concerned,
- facilitated procedures for all players concerned (mutual recognition between supervisory authorities),
- useful practical information to complete this project.

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## About AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority.

AFEP has 115 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion.

AFEP is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property, digital, labour law and social protection, environment and energy, corporate social responsibility and trade.

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