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Dear Chair,

## **EDPB Guidance following Schrems II**

I write to you regarding recent developments within the field of international data transfers following the Schrems II judgement<sup>1</sup>. We have taken note of the European Data Protection Board (EDPB) and national Data Protection Authorities (DPAs) FAQs in response to the Schrems II judgement. However, these did not provide the level of practical guidance businesses need. Therefore, in consultation with stakeholders, it is necessary to promptly develop comprehensive, coordinated EDPB guidance to ensure continuation of international data flows. This is indispensable for business operations, competitiveness and growth of European companies, including SMEs, along with daily social interactions in an increasingly digitalised global economy and society.

As over 5,000 businesses invested and took part in the successful application of the EU-US Privacy Shield for over 4 years, including many more EU businesses who directly benefited through the wider economic supply chain, we were naturally disappointed to see this transatlantic trade success story invalidated overnight, leaving companies with little safe and practicable alternative. However, we are encouraged by the recent communication from both governments to find a solution. A long term solution will likely take some time to finalise which our economies and societies cannot afford, particularly in the wake of COVID-19, this is why we urge the US and EU governments to work together to quickly find a sustainable solution that satisfies both governments' needs while allowing international data transfers to continue.

As you know, the Schrems II judgment has a wider implication than the invalidation of the Privacy Shield alone. Data transfers to all third countries using Standard Contractual Clauses (SCCs) are affected. Although we are encouraged that SCCs remain valid as an international data transfer instrument in the support of international trade, we are deeply concerned by the new expectations placed on businesses. In particular, we refer to the "risk assessment" exporters will have to carry out with regard to the importers domestic law before relying on an SCC which goes further than the GDPR itself. This is not something that businesses can carry out with ease or legal certainty. We call for this risk assessment to be conducted by the European Commission, with the EDPB's assistance, and further encourage the EDPB to work closely with the European Commission to consider data importers' and exporters' perspectives on what long-term sustainable solutions might look like.

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<sup>1</sup> Case C-311/18 - Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems



Different data transfers carry different risks (eg. type, purpose, amount and roles of those involved (processor/controller)). Therefore, the solutions provided need to be wide reaching, harmonised and consistent, to cover all cases for all parties. It will be important that future EDPB guidance enables all parties to assess each transfer on a case-by-case basis taking into account existing variations among different organisations as well as within a single organisation. We therefore encourage the EDPB to think holistically about possible approaches that would allow for the assessment of various aspects and risks associated with different types of transfers while considering pragmatic solutions that can take into account companies' and other organisations' limited resources or types of transfer that may be consistent or similar across a variety of organisations and instances. It is important that a risk-based approach is kept, an approach based on objective assessments of the factual risks involved.

Timely guidance from the EDPB should ensure a practical, swift and coordinated response to the Schrems II judgement, in consultation with stakeholders. This is essential to provide European citizens and businesses with legal certainty and ensure harmonised interpretation and application of the judgment at European level that avoids a potential fragmented implementation by national DPAs. Timely guidance from the EDPB on the types of "supplementary measures" that organisations may be able to use in order to provide "additional safeguards" for cross-border data transfers, will also be an essential resource for European companies to continue business operations without significant disruptions. A detailed catalogue, containing exemplary contractual, technical and organisational measures considered suitable by the EDPB to mitigate the risks associated with cross border data transfers, could provide the desired assurance that businesses need.

In the meantime, given that the CJEU has not called for the retention of personal data within the boundaries of the EU, companies should not be expected to stop all international data flows that could be affected by this disruptive change. Therefore, we urge the EDPB and DPAs not to proceed with sanctions against companies until this Guidance is adopted.

We would also like to take this opportunity to highlight that simply shutting off data transfers to certain global trading partners is detrimental for Europe to compete in the global economy. International trade increasingly relies upon data transfers. This is not just about digital born businesses but all of those in Europe that have digitally transformed, are planning to do so or rely upon services that transfer data to other jurisdictions in order to keep a fully operational company. Turning off the taps will only harm Europe itself, particularly in the midst of a global pandemic where international cooperation is paramount. Any consideration of the suspension of data flows must be rooted not in isolation, but considered in light of the full economic and social impacts it would have across Europe.

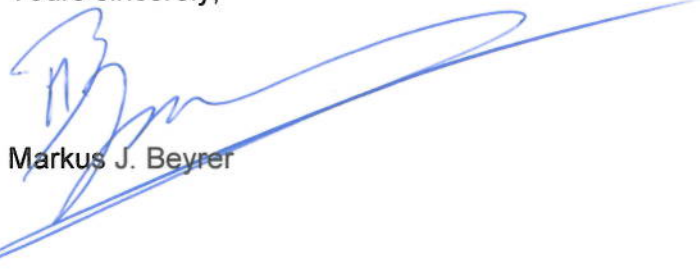
While the debate in relation to finding the balance between national security intelligence gathering and privacy of individuals will continue we do not believe that data localisation to the detriment of the European economy is the solution, particularly as Europe carries

out its own intelligence gathering and foreign agencies can act ex-territorially. Isolation is contrary to our interests, values and culture.

We urge the EDPB to act as rapidly as possible in order to provide the needed clarification, as we believe businesses are at a truly pivotal juncture in their efforts to recover from the effects of COVID-19 and a weak global economy.

BusinessEurope stands ready to provide additional support and facilitate dialogue to promptly find workable and pragmatic solutions to all of these issues.

Yours sincerely,



Markus J. Beyrer