



Foundation of Data Protection Professionals in India

[Not for Profit, Section 8 Company limited by guarantees: CIN No: U72501KA2018NPL116325]
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Feedback on Guidelines 07/2022 on Certification as a Tool for Transfers Version 1.0, adopted on 14th June 2022

To

Chairman

EDPB

Rue Wiertz 60, B-1047 , Brussels

Dear Sirs

This feedback is being submitted from the Foundation of Data Protection Professionals in India (FDPPPI), a premier organization dedicated to Privacy and Data protection in India.

Brief Particulars of FDPPPI:

FDPPPI is a Not-for-Profit organization registered under Section 8 of Indian Companies Act, established by individual data protection professionals and focusses empowering the Data Protection Community in India by developing a professional skilled work force through Certification programs on Privacy and Data Protection laws and Compliance requirements.

FDPPPI also supports the "Data Protection Compliance Standard of India" (DPCSI) which is a unique unified compliance framework for compliance of multiple data protection laws including GDPR.

DPCSI Certified audit process also supports a "Data Importer Assurance Certificate as part of the GDPR compliance Certificate" that specifically addresses the requirements of Compliance to Chapter V of GDPR.

DPCSI Certified audit process also supports issue of a unique "Data Trust Score" (DTS) by the auditor for GDPR Compliance as a measure of the maturity of compliance.

More Details of our organization is available at www.fdppi.in

Binding and Enforceable Commitments to be implemented

We note that the guidelines adopted on 14 June 2022 reflect specific aspects regarding certification as a tool for data transfers from EEA to third countries.

We have deliberated on the subject matter and would like to share our observations and suggestions for more clarity.



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Prima facie, when a data importer is required to give an undertaking that the local Government and Law Enforcement will not have access to the data being processed, there could be conflicts with the local law.

This requires to be addressed in such a manner that the requirements as required by EUCJ are implemented without necessarily confronting the Government and Judiciary of the data importer's country. We bring to your notice a system is already been addressed in India which can be properly incorporated as a suggestion in the said guidelines.

FDPPPI has adopted a Data Protection Compliance framework namely the Data Protection Compliance Standard of India (DPCSI) which is a Certifiable framework for compliance of data protection laws including GDPR and incorporates unique compliance requirements that improve upon other known frameworks.

This framework suggests a mechanism by which the privacy concerns/risks under GDPR are adequately mitigated.

This unique mechanism enables processing by the data importer **only** on a pseudonymous basis and more importantly, **the pseudonymizing key is held only under the control of the Data Exporter.**

In view of the adoption of this compliance measure as a standard part of DPCSI, all DPCSI based compliances are designed to be automatically compliant with GDPR and the cross-border transfer assurances required under GDPR.

To further enhance the commitment of the data importer in India, the DPCSI certification adds a "Data Importer Assurance Certification" (DIAC) and provides a "Data Trust Score" (DTS) as a measure of the maturity of GDPR compliance. The Data Importer may share the Augmented GDPR Compliance Certificate with DIAC and DTS with the Data Exporter which may eventually be presented to the Certification authority as well as the Supervisory authority at the Data Exporter's for validation.

We trust that the measures adopted by FDPPPI under the DPCSI framework will make GDPR Compliance easy. This will add reliability to any assurance provided in the contract by the Indian data importer more than what is ensured by other frameworks.

We are of the view that this solution which protects the Privacy Rights of the EU data subjects without infringing on the rights of the sovereign Government of the data importing country may be factored into the EDPB guidelines.

We note that this kind of approach is indirectly referred to in Use Case 2 of the Annexure to your guideline. However, if it is specifically mentioned in the certification criteria, there will be better clarity.



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Benefits of this approach

The DPCSI solution along with the "Data Importer's Assurance Certification" ensures that the data importer deals only with pseudonymized personal data. Hence the contract signed with the data exporter need not contain clauses such as "The local Government or law enforcement will not have access" or "Data Subject will have rights of remedy in EEA and not restricted to Indian Courts", both of which are ultra-vires the Indian law and cannot be enforced.

Even if the contractual agreements contain such clauses, they may be subject to litigation and could be considered "Unconscionable" and therefore voidable.

On the other hand, the DPCSI system avoids such unreliable dotted line contracts entered into by the business partners without a commitment to protect the GDPR requirements.

It is our view that the EDPB guidelines on Certification may support this innovative measure adopted by Indian Data Importers by a clear mention of the measure as an exemption. This will also be a good measure to be adopted worldwide.

Our Recommendation

In view of the above, we recommend that the following clause may be added in the guideline.

"The requirement of ensuring prevention of law enforcement agency or Government of the data importer's country from accessing the data under process by the data importer, as well as the enforcement of data subject's rights of remedy against the data importer in the EEA may be exempted by a specific approval of the data transfer agreement by the supervisory authority. provided, the data is proposed to be transferred with appropriate pseudonymisation control in which the data exporter retains confidentiality of the pseudonymisation mapping."

In the event any data importer misuses this provision and re-identifies the personal data by cheating on the Certification criteria, such action would be considered as a criminal offence and the Data Exporter can invoke the laws of the data importing country.

This can create a deterrence and also enable the Data Exporter to invoke indemnity without the data importer raising the excuse of "Un enforceable dotted line contract".

Indian legal system already enables such criminal action against any person who re-identified, a de-identified information and data exporters who deal with Indian data importers are eminently supported by the local laws (both under the existing Information Technology Act 2000 as well as the proposed data protection law which is to be passed) to protect the rights of the data subjects of EEA.

We therefore request that the suggested clarification is added to the guideline.



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FDPPPI would be happy to provide any further clarifications on the DPCSI and the Data Importer Assurance Certification that would be required by EDPB/Supervisory authorities to provide specific approval of data transfer agreements which incorporate the FDPPPI's certification mechanism.

Regards

Yours sincerely

Na.Vijayashankar
Chairman