

**Brussels, 1<sup>st</sup> October 2021**

**FEDMA answer to the EDPB consultation on Guidelines 04/201 on codes of conduct as tools for international transfers**

The European Data Protection Supervisor published a consultation on their draft [Guidelines 04/2021 on codes of conduct as tools for transfers](#). FEDMA is developing a transnational GDPR Code of Conduct and it would be interesting if this Code could serve as a basis for transfer to third countries. We therefore thank the EDPB for this opportunity and are providing the following feedback:

**Encouraging transnational codes over national codes**

FEDMA understands that such a code of conduct needs to be approved by the competent supervisory authority (comp SA) and to be granted general validity within the Union by the Commission. We therefore understand that only transnational codes can serve as a basis for transfer. In light of recent developments, mostly national codes have been approved and only two Cloud transnational codes. In our view, this could be a way to encourage transnational codes and further harmonize GDPR implementation.

**Uncertain benefits for Code owners**

A code intended for transfers can frame transfers from controllers/processors that do not adhere to that code of conduct to controller/processors in a third country having adhered to the code, provided that a commitment to comply with the obligations set forth by the code when processing the transferred data, including with regards to the rights of the data subject, is included in the code. This means that the companies in the third countries will need to pay to adhere to the Code (cover costs of audit and seal for example, even if the Code owner is European). It does make sense because the GDPR applies extra territorially already. However, setting up a Code and monitoring body implies time, staff and costs covered by the Code owner and, taking a big picture view, it seems uncertain that the Code owners will be able to generate sufficient revenue from the Code. Indeed, revenue generated by the Code, comes from auditing which goes to the monitoring body to fund itself. The Code owners will have to promote the code, not only in the EU, but especially in the third country, in the language of the third country. Some data processors are major multinational in monopolistic situations which therefore hold more power of negotiations than Code owners. Even if a Code owner succeeds in writing a code, manages the requirements for the monitoring body, the Code owner may not find third country industry members to join the Code. Therefore, the financial and legal benefits of a Code seem uncertain for Code owners. It therefore makes sense for Code owners to start with a transnational European sectorial Code, before extending it for safe international transfers. As such, the Code owner will be able to rely on its European membership to promote and convince data processors in third countries to join the Code. This means that Codes of conduct require many years of procedure before effectively serving as a tools for safe international transfers.

## **Members to the Code need more procedural and legal certainty**

The fact that any EU/EEA authorities may be competent is confusing for the Code member. The Code member will be seeking clear procedures, i.e. individual complaints should be encouraged to be made in front of the local monitoring body and only the lead comp SA which approved the Code or the comp SA who accredited the monitoring body should be competent, irrespective of where the individual complained.

The Code member will be seeking legal certainty through the Code, the benefit of which is legal certainty of compliance to mitigate fines. Safe transfer of data requires adequacy of protection. However, adequacy does not necessarily mean identical to GDPR, it can mean consistent with GDPR. A company outside the EEA may not be respecting the GDPR strictly speaking but still offering adequate level of protection. Therefore, this guidance should reflect better consistency with GDPR to provide legal certainty to business who are using adequate processes.

## **Code owners need clear and exhaustive requirements**

The code needs to address the same content requirements as other codes of conduct and more in addition (for example Suitable training program, Criteria of selection of monitoring body).

This means that a transnational code approved by national competent Supervisory Authority and having general validity may yet have to be amended to cover all the above mentioned elements. The amendments must go through the entire approval process ( i.e. comp SA approval, opinion of the Board and Commission validity). This could really lengthen the process and creates an element of uncertainty for the transnational code. What happens if the code works as a transnational code but required extensive amendments for data transfers? The risk is that the transnational Code may need to be updated and amended to align on its “international” part. What happens if the monitoring body is accredited for the Code but denied accreditation for the international transfer?

## **SA competence for accrediting the monitoring body**

The Code owner can sign a contract with an entity to become the monitoring body as provided in the Code. If the code owner delegates the monitoring of the code to an entity within the EEA, it is unclear which comp SA will accredit the monitoring body; will it be the lead SA or the local SA?

## **Appropriate requirements for the monitoring bodies**

Monitoring body requirements vary among member states and they tend to be overall very high, which is challenging SMEs to develop Codes of Conduct. The monitoring body requirements should be tailored to the Code, its sector and the data processing risks. This will encourage not only platforms but also European SMEs to develop codes with monitoring systems adapted to their sector, their processing of data, the risks, and their revenue. Otherwise, SMEs will be able to develop Codes but not to have them enforced by monitoring bodies which the sector cannot afford. Members to the Code finance the monitoring body through audit and monitoring fees. These fees must remain affordable to SMEs or there will not be any industry “buy-in” to sustain a monitoring body. Hence, the importance for a monitoring body to be adapted to the Code it enforces and its sector.

## **Codes, as tools for safe transfer, will be very few**

Considering the very high level of requirements and the lack of strong incentives, FEDMA considers that codes of conduct for safe international transfers will de facto be very few. A business will be more likely to invest in lawyer fees for SCCs rather than wait for approval of a Code which is a lengthy procedure. FEDMA therefore remains very concerned that the EU is shutting itself down to limit international transfers and that this will impact the competitiveness of our SMEs.