To: Commissioner Jourová

RE: Personal Data Transfer to the US

FEDMA would like to start by thanking the European Commission for its recent communication on the transfer of personal data from the European Union to the United States of America.

We are pleased that the European Commission has reduced some uncertainties regarding the transfer of data to the US, highlighting existing alternatives to the Safe Harbour agreement which has been invalidated by decision of the Court of Justice of the European Union in the Schrems case recently. This Communication aligns with some of the statement from the article 29 working party which also recognized that “data protection authorities consider that standard contractual clauses and binding corporate rules can still be used”.

Since the Court of Justice judgement, FEDMA has called for solutions to maintain transatlantic data flows while ensuring the protection of personal data, through a rapid adoption of a new Safe Harbour agreement, and the development of appropriate guidance for alternative solutions. We support the objective of the European Commission to conclude rapidly the negotiations with the US on a renewed and safe framework on transfer of personal data.

However, we would like to share the following concerns with you:

The ruling of the court of justice has created new standards to evaluate international data transfers, and has provided clarity on the scope of power of the data protection authorities. Data Protection Authorities confirmed in their latest statement that “the Working Party will continue its analysis on the impact of the CJEU judgement on other transfer tools”. FEDMA is concerned with the uncertainty cast on the validity of the Standard Contractual Clauses, which are, at the same time, being recommended as a valid alternative solutions.

More importantly, FEDMA is highly concerned by the various responses given by different data protection authorities at national level. In particular, we are concerned by statements made by some data protection authorities announcing that no new approval of Binding Corporate Rules and Standard Contractual Clauses will be issued. Such an approach puts organisations in a very difficult position, leaving them with no alternative solution to the Safe Harbor agreement for the transfer of data. Neither does it provide them with a transition period to adapt to these changes. Consequently, in some Member States, due to the lack of solutions, organisations are left with no other choice than to cease their activities or to transfer data in an illegal manner until a suitable solution is found and implemented. Such a situation is not sustainable for organisations which are facing the critical consequences of this choice on a daily basis. The uncertainty also extend to organisations which have been relying and still rely on a bona fide basis on Standard Contractual Clauses pursuant to a Commission Decision that is still valid today.

The short term uncertainty and the lack of reliable long term solutions lead an increasing number of organisation to rethink not only their data flows but also the services they can offer to European

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citizens. Many organisations are simply considering to stop data transfer to the US, leading to a loss of transatlantic business opportunities, and to higher cost invested by European companies into rushed and sometime inadequate alternative solutions.

Finally, we are very aware of the rapidly approaching deadline of the end of January set up by the Article 29 Working Party to find a solution to a new agreement with the US authorities. FEDMA appreciates the European Commission’s progress in its negotiations and willingness to achieve an agreement as rapidly as possible. In this context, it is important to ensure that organisations are not left with no solutions for transfer of data after January 2016, and we encourage the European Commission to invite Data Protection Authorities to consider flexibility in enforcement action until a new suitable solution has been found and a transition period to allow organisations to move to the found solution.

The current situation makes it more than obvious that legal certainty requires strong coordination of among data protection authorities, EU institutions, member states in order to provide harmonized, rapid, long term and sustainable solutions, which are necessary to remove some of the huge legal uncertainty European organizations are currently facing.

The need for businesses to have a reliable single partner to dialogue with on matter of data protection is emphasized. In our opinion, this partner can only be the independent official data-protection authority. The almost finalised Data Protection Regulation will allow private organisations to sue data controller in their own right in front of a court (Article 76). In doing so, such private organisations would bypass any possible interpretation of the legislation the Data Protection Authority would give, preventing it from playing its role for interpretation of the legislation, and from remaining the reliable partner to find suitable and consistent solutions.

We urge the European Commission to promote coordinated and harmonized solutions and actions, and to ensure that data controllers will not face discussions on similar issues regarding data-protection matters with an endless number of private institutions who, acting only in the interests of their own respective agendas, will produce further uncertainties, but will be instead able to rely on one single authoritative partner.

Best regards,
FEDMA Co-Chairwomen
Ms. Diana Janssen Dr. Sachiko Scheuing

Cc: Ms Renate Nikolay (Head of Cabinet)
Mr Kevin O’Connell (Cabinet member in charge of DP)
Mr Bruno Gencarelli (Head of the DP unit, DG Justice)
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