Insurance Europe response to EDPB Guidelines on the interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR

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Insurance Europe welcomes the opportunity to comment on the European Data Protection Board (EDPB) draft guidelines on the interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the General Data Protection Regulation (GDPR). It welcomes the draft guidelines as they provide clarity on the key criteria to qualify a processing as a transfer of personal data to a third country.

However, Insurance Europe is concerned that, in one of the examples provided, the guidelines do not take into account the type of data involved in the processing and the actual risks associated with the transfer. Therefore, it invites the EDPB to provide the necessary clarifications on the issue as described below.

- **Example 3 should not be considered a transfer pursuant to Chapter V of the GDPR**

In example 3, the draft guidelines describe the case in which a controller without an EU establishment sends personal data of non-EU residents to a processor in the EU. After processing the data on behalf of the controller, the processor in the EU transmits the data back. According to the EDPB this re-transmission constitutes a transfer to a third country pursuant to Chapter V of the GDPR. Insurance Europe would ask the EDPB to reconsider its assessment as it would unduly extend the GDPR's territorial scope of application. The non-EU controller is not subject to the GDPR in accordance with its Art. 3, but would be required to rely on a safeguard in Art. 46 GDPR or a derogation in Art. 49 GDPR. The resulting situation appears dissonant and contradicts the EDPB guidelines 3/2018 (page 13) insofar as they declare that *"[no] additional obligations [are imposed] on controllers outside the Union in respect of processing not falling under the territorial scope of the GDPR"*.

Furthermore, as the EDPB correctly states in para. 7 and 11 ff., in order to qualify as a transfer to a third country the processing in question must involve personal data being **disclosed by transmission or otherwise made available** to a data importer. However, in cases such as example 3 the personal data is not disclosed to the controllers in the third country since it originates from them and is already available to them. Insurance Europe believes that the qualification as a data transfer to a third country should not only depend on the parties involved in the processing, but should also **factor in the data concerned**.

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The purpose of Art. 44 ff. is to ensure that the level of data protection guaranteed by the GDPR is not undermined by transferring personal data protected under the GDPR to a third country for (further) processing. That purpose cannot apply to these cases because the personal data was not protected under GDPR in the first place.

In its current state, example 3 of the draft guidelines 5/2021 would in practice require EU processors to conclude module 4 of the new standard contractual clauses (SCCs) for data transfers to third countries when re-transmitting the data to the non-EU controller. Meanwhile a non-EU processor would not be required to do so. Since in this configuration the SCCs would grant non-EU residents third-party beneficiary rights that they would otherwise not have, the draft guidelines create a massive competitive disadvantage for EU processors.

Recommendation: The EDPB should clarify that processors established in the EU/EEA do not have to comply with the provisions on transfers of personal data to third countries under the GDPR when transferring back data originated by its non-EU controller.

Indeed, if the processor merely processes and transfers back personal data that has been received from the third-country controller without combining that data with personal data collected by the processor itself, the processor does not disclose any "new" data to a "new" recipient. The processor merely returns the data to the country that is its place of origin. Therefore, no increased risk arises from the transfer of the data back to the "third country". In these cases, the requirement to use Art. 46 safeguards for the transfer back would expand obligations resulting from the GDPR to data processing that does not even fall under the GDPR's territorial scope of application in the first place.

- **Need for additional clarifications**

The EDPB is also invited to provide additional clarification for the frequently occurring situations wherein personal data subject to the GDPR is processed by a third-country processor or its EU subsidiary on behalf of an EU controller **with the data physically remaining in the EU**. With respect to the increasing use of cloud services, these situations are increasing in relevance, while the necessity of transfer tools pursuant to Chapter V of the GDPR often remains a controversial point of discussion between the parties involved. Further guidance from the EDPB would create legal certainty.