Spolek pro ochranu osobních údajů

Comments on the EDPB's draft "Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR"

We welcome the opportunity to present our comments to the recently published EDPB draft Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR (Guidelines).

General comments

Firstly, we would like to point out that the issue of data transfers and surrounding uncertainties have been with the businesses for some time now and it did bring serious complexities into advising our organisations in the role of DPOs (or similar privacy experts). We live in a globalised world with many organisations operating on a global scale for which the need to internationally transfer personal data is an essential part of their business. It is often a matter of staying competitive in today´s world. For this we find the creation of a realistic, comprehensive, credible and secure framework which would allow organisations to benefit from the international exchange of personal data to support economic prosperity and growth to be of key importance.

An overly complex data transfer system would stimulate the creation of autonomous data transfer systems by specific countries (e.g. UK[1] or China´s PIPL) which might be incompatible with the GDPR and might bring about even more requirements on data exporters subject to the GDPR on top of the existing complexity.

In general, we appreciate the Guidelines and its practical effort to clarify some of the key aspects of international transfers and the applicability of Chapter V of the GDPR and its interplay with the Art. 3 of the GDPR, however, there still seem to be numerous questions without a clear answer.

We have to bear in mind that the standard contractual clauses adopted by the Commission (SCC) represent the most commonly used safeguard tool listed in Art. 46 of the GDPR (here we consider the recently released set of standard contractual clauses - COMMISSION IMPLEMENTING DECISION (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council (New SCC)). To clarify the interplay between the territorial scope of the GDPR and data transfer rules is therefore of essential importance to all its addressees.

[1]https://www.gov.uk/government/news/uk-launches-data-reform-to-boost-innovation-economic-growth-and-protect-the-public

Spolek pro ochranu osobních údajů / Data Protection Association
with its registered seat at the address Hellichova 458/1, Malá Strana, 118 00 Praha 1 / Prague 1,
registration with public register: Municipal Court in Prague, file No. L 61299
Business ID No.: 03493679, e-mail: spolek@ochranaudaju.cz, tel.: 296210562

The New SCC delivered a good and flexible set of rules to apply to data transfers on one hand, whilst on the other hand they brought about the urgency to clarify the question of their applicability (and the Chapter V of the GDPR in general) in the light of Art. 3 of the GDPR, especially Art. 3(2).

To start with, the New SCC at the very begining seems to exclude its applicability for transfers to importers not established in the EU but still subject to GDPR under Art. 3(2) by stating:

Article 1

1.The standard contractual clauses set out in the Annex are considered to provide appropriate safeguards within the meaning of Article 46(1) and (2)(c) of Regulation (EU) 2016/679 ***for the transfer*** *by a controller or processor of personal data processed subject to that Regulation (data exporter)* ***to a controller or (sub-)processor whose processing of the data is not subject to that Regulation (data importer).***

Similar conclusions can be derived also from in Rec. 7

(7) A controller or processor ***may use the standard contractual clauses*** *set out in the Annex to this Decision to provide appropriate safeguards within the meaning of Article 46(1) of Regulation (EU) 2016/679 without prejudice to the interpretation of the notion of international transfer in Regulation (EU) 2016/679.* ***The standard contractual clauses may be used for such transfers only to the extent that the processing by the importer does not fall within the scope of Regulation (EU) 2016/679. This also includes the transfer of personal data by a controller or processor not established in the Union, to the extent that the processing is subject to Regulation (EU) 2016/679 (pursuant to Article 3(2) thereof****), because it relates to the offering of goods or services to data subjects in the Union or the monitoring of their behaviour as far as it takes place within the Union.*

In other words, the New SCC might be understood to indicate that they may not be used when the importer is subject to the GDPR, however not established in the EU (Art. 3(2) of GDPR). Such a statement has caused many discussions among DPOs and other privacy experts as it provides no answer as to whether such scenario qualifies as data transfer under Chapter V of the GDPR and if so, how to address such type of data transfer.

The Guidelines offer a diverse opinion in that direction by emphasising the "territorial" aspect of the processing and need to realistically ensure that the transfer tools provide essentially equivalent protection under GDPR including situations falling under Art. 3(2) of the GDPR by stating:

2. The provisions of Chapter V aim at ensuring ***the continued protection of*** *personal data after they have been transferred to a third country or to an international organisation. When personal data is processed on EU territory it is protected not only by the rules in the GDPR but also by other rules, both on EU and Member State level, that must be in line with the GDPR (including possible derogations therein) and ultimately with the EU Charter on fundamental rights and freedoms****. When personal data is transferred and made accessible to entities outside the EU territory, the overarching legal framework provided within the Union no longer applies.***

This statement is then further accompanied by the obligation to *assess whether supplementary measures need to be implemented in order to bring the level of protection to the transferred data up to the EU standard...*[2]

In other words the scenario when the data exporter is not established in the EU, however subject to GDPR under Art. 3(2) of the GDPR, does not *per se* provide sufficient protection to the data and might still qualify as data transfer in the meaning of Chapter V of the GDPR (despite the extraterritorial applicability of the GDPR under Art. 3 of the GDPR), and appropriate transfer tools under Art. 46 of the GDPR (including additional measures as the situation might require) should still be used.

The reason being that local legislation might entitle the government access to personal data to an extent beyond what is necessary and proportionate in a democratic society. Accordingly, a disclosure of personal data to an importer, to whom the GDPR is applicable on an extraterritorial basis, should still be regarded as a data transfer. The Guidelines clarify the questions related to the applicability of Chapter V of the GDPR and thus set out the definition of the notion "*transfer of personal data to a third country or to an international organisation*"(data transfer) by providing its definition criteria, and relates these to the application of Art 3 of the GDPR in order to shed light on when an operation with personal data qualifies as data transfer with all its implications.

The third criterion provided establishes that the operation with the data qualifies as data transfer in all cases when

3) The importer is in a third country or is an international organisation, ***irrespective of whether or not this importer is subject to the GDPR in respect of the given processing in accordance with Article 3.***

The extraterritoriality principle expressed in Art. 3(2) of the GDPR is then for the purpose of international data transfers prevailed by the fact that the data is processed outside the EU and as such ***the overarching legal framework provided within the Union no longer applies.***[3]

In this connection we find it important that the Guidelines should clearly confirm that <u>it is possible</u> to use the New SCC even in the case when the controller/processor exporting data is not established in the EU, however is subject to Art. 3(2) of the GDPR. We understand, that there is a theoretical possibility for a specific SCC to be created for such a scenario, the Guidelines note that in this scenario, this would mean using a transfer tool "*currently ... only available in theory",* however, for the time being the EDPB should provide for a solution to address this in reality rather common scenario.

[2] See para 3 of the Guidelines

[3] Considering the provision of para (10) of the Guidelines:

> *10. It is worth underlining that controllers and processors, which are not established in the EU, may be subject to the GDPR pursuant to Article 3(2) for a given processing and, thus, will have to comply with Chapter V when transferring personal data to a third country or to an international organisation.*

To sum up, disclosure of personal data to an importer, to whom the GDPR is applicable on an extraterritorial basis, should still be regarded a data transfer and the New SCC should be applicable.

Last but not least, we would like to point out that the Guidelines do not pay any attention to transfers under Art. 49 of the GDPR. We understand the fact that the use of derogations is rather limited to specific situations, however, we believe that it should not be ignored.

Specific comments

Practical examples provided

We consider the addition of the practical examples of the data transfer and their assessment as to whether they are to be considered a data transfer under Chapter V of the GDPR to be very helpful.

We would find it very useful if the examples also **provided specifications of the type of the model Clauses (e.g. C-P, P-P) to be signed in case the example qualifies as data transfer.**

Also, we would very much appreciate examples of data transfer scenarios between controllers to be added.

Example 1

The scenario describes the situation when the data subject passes his/her personal data directly to the company outside the EU **which does not constitute a transfer** of personal data since the data are not passed by an exporter (controller or processor), but by the data subject directly on his/her own initiative.

Would the possible transfer (which will not be an "onward" transfer) of the data acquired by the company outside the EU directly from the data subject to another third country qualify as a data transfer under Chapter V Art. 44 in case the first step in the transfer chain did not actually qualify as a data transfer (data were exported from the EU directly by the data subject without any involvement of the controller/processor)? Especially in the case where the transferring controller will not be subject to the GDPR under Art. 3(2) of the GDPR.

We understand the increased risk associated with such a transfer of data to a third country, however, it seems that under the text of Article 44 of the GDPR might not consider such transfer **as data transfer under Chapter V** and data security would have to be ensured in another way (eg as suggested in Point 17). We would appreciate clarification of this issue.

Example 3

We agree that the scenario provided would fall under the definition of the transfer. On the other hand it might negatively impact the competitiveness of EU businesses and the readiness of third country "controllers" to use EU companies as their subcontractors (processors), as in these cases this EU-subcontractor will "return" the personal data with obligation to comply with at least some provisions of GDPR (see modules four of the New SCC) even in the case where no combination of the personal data received from the third country with personal data collected by the processor in the EU would be made. It could be typically in the area of results of foreign clinical trials processed by processors in the EU. We doubt that the controller will have a strong motivation to cooperate with an EU established entity because the transfer would bring additional complexity in the form of the New SCC application and therefore the controller would rather choose a supplier from outside the EU. **We believe that a pragmatic approach must be taken in these cases, which would not harm European businesses.**

For this reason we believe that in some cases it would not be necessary for the processor to enter into a New SCC with the controller, but such processor could instead rely on the exemptions provided for in Article 49; **we especially suggest that the exception under Article 49(1)(b) and (d) could be in some cases relied on.**

Further ambiguities may arise if the controller declines to sign a New SCC required by the exporting processor. In this case the processor will then find himself in an unenviable situation, where on the one hand the return of data (= transfer) without New SCC will be a breach of GDPR rules, on the other hand their non-return will be a breach of a contractual obligation towards the controller (or stipulated by foreign law) with all possible negative consequences (it will not always be possible to reach an agreement on the use of the New SCC with the controller in advance).

We would like to emphasise that Art. 44 of the GDPR provides as a general principle for transfers that *measures need to be implemented in order to bring the level of protection of natural persons guaranteed by this Regulation is not undermined*. In this case, however, the level of protection as well as the number of obligations imposed on the controller (= importer) through New SCC will rather be increased. It would therefore be appropriate to allow the use of other legal bases for transfers (eg Article 49 outlined above).

Example 5

The example addresses the employee position accessing remotely the employer´s data whilst being on a business trip concluding that such scenario does not qualify as transfer as the disclosure happens between the same controller (employee being an integral part of the controller). **We fully agree with such conclusion, however, we find it important to clarify whether the same conclusion would apply to an individual contractor in a position similar to an employee, performing a job for the controller on a contractual basis if such person exclusively uses the controller´s equipment (PC/phone), is subject to internal rules and policies, and is regularly trained similar to an employee.** We believe that the wording of art. 29 GDPR may create space for the above-mentioned contractor not always being considered as a processor, and rather being considered as a quasi-employee.

Example 6

The Guidelines note that disclosures of personal data between members of a corporate group will in most cases amount to transfers because the players will represent different legal entities – e.g. in the case of subsidiary and parent company. The draft guidelines however do not consider branches of companies – which do not have separate legal personalities.

Can you please confirm that following the logic of example 6, a disclosure of data between a branch office and a head office (not having different legal personalities) will not qualify as a transfer?

We are grateful for the opportunity to provide our comments on the draft Guidelines.

Prague, 27.1.2022

JUDr. Vladan Rámiš, Ph.D.
Chairman of the Committee
Spolek pro ochranu osobních údajů

Alice Selby, LLM, Ph.D., CIPP/E
Member of the Committee
Spolek pro ochranu osobních údajů