

Comments on 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

Relevant Clause of Guideline	My comment
Article 7 (page 4)	<p>If an importer in a non-EEA country transmits personal data from another company in the same non-EEA country, is the transmission “transfer”?</p> <p>For example, if an exporter in Czech transmits personal data to an importer in Australia, and the importer transmits the very personal data to another company in Australia, is the transmission inside Australia considered “transfer”?</p> <p>As far as I know, there are two views on this issue.</p> <p>One view is that domestic transmission inside the same non-EEA country is not “transfer” because the relevant risks to processing activities in a third country (e.g. Australia, in the above-mentioned example) have been measured and addressed at the time the original export from EEA-country to non-EEA country, and therefore no more measures are necessary.</p> <p>The other view is that domestic transmission inside the same non-EEA country is “transfer” because such transmission is conducted outside EEA. This view may refer to Recital 20 of COMMISSION IMPLEMENTING DECISION (EU) 2021/914 of 4 June 2021 (as quoted below), arguing the practice and existence or absence of requests in sectors should differ depending on sectors, and if a non-EEA importer transmits personal data to another non-EEA company in the same country but in a different sector, there is no guarantee that the risks relevant to processing activities in Australia in another sector have been properly measured and addressed at the time the original transfer from EEA-country to non-EEA country.</p> <p>(Consider an example that an EU-established food company transfers personal data to an Australian food company, and then the Australian food company transmits that personal data to an Australian healthcare company.)</p> <p>“Recital 20:</p> <p>The parties should take account [...] the laws and practices of the third country of destination. As regards the impact of such laws and</p>

	practices on compliance with the standard contractual clauses, different elements may be considered as part of an overall assessment, including reliable information on the application of the law in practice (such as case law and reports by independent oversight bodies), the existence or absence of requests in the same sector and, under strict conditions, the documented practical experience of the data exporter and/or data importer.”
Example 1 (page 5)	<p>Example 1 assumes that there is no establishment in the EU, and concludes that there is no transfer from Maria to the Singapore-established company.</p> <p>Unlike the assumption, if (a) there was an establishment (e.g. a subsidiary) of the Singapore-established company, and (b) the establishment in the EU promoted Maria to insert her personal data by filing a form on an online clothing website operated by the Singapore-established company, is Maria’s insertion regarded as a transfer? If Maria’s insertion would be regarded as a transfer, is it because Maria’s insertion is legally construed as an insertion by the establishment in the EU due to the establishment’s promotion activities? Please note that the physical action to insert Maria’s personal data is conducted by Maria herself, and no employees of the establishment in the EU do not take any physical actions to insert Maria’s personal data instead of/on behalf of Maria.</p> <p>Equivalent data flows to the above-mentioned data flow happen in a variety of situations, and I would like you to clarify the vagueness over the data flow.</p> <p>For example, in the context of marketing promotions like the Example 1, local subsidiaries make commercial promotions in their local regions while the website for filing and applying is operated by their non-EU-established parent company.</p> <p>Also, equivalent data flows occur in the context of global whistleblowing system and global employment survey. For instance, an employee of EU-established subsidiary is encouraged/required to report compliance issues and employment satisfaction by filling a form on an online website operated by their non-EU-established parent company. Employees may or may not anonymously report the issues/satisfaction depending on each company group’s policy. In such cases, an equivalent data flow from Maria to non-EU-established company occurs, and I would like you to clarify whether or not such data flows are regarded as a transfer.</p>
Article 14 (page 6) “two different (separate)	<p>I would like you to insert an example to clarify whether or not my understanding below is correct:</p> <p>If (a) an Australian company has a branch and a representative office in Czech, (b) the branch and representative office do not have</p>

parties”	separate legal capacity from the Australian company, and (c) the branch and the representative office in Czech transmit personal data to the Australian company, the transmission is NOT “transfer” because neither the branch nor the representative office are “separate parties” from the Australian company, and therefore no measures under Chapter V of GDPR are necessary for the transmission. The only thing the Australian company, its branch and its representative office must do is to implement technical and organizational measures in accordance with Article 32 of the GDPR.
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