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EuroCommerce comments on the EDPB 05/2021 Guidelines on the Interplay between the application of art. 3 and the provisions on International transfers as per Chapter V of the GDPR

About EuroCommerce

EuroCommerce is the principal European organisation representing the retail and wholesale sector. It embraces national associations in 28 countries and 5 million companies. Retail and wholesale is the link between producers and consumers and generates 1 in 7 jobs, offering a varied career to 26 million Europeans, many of them young people. EuroCommerce is the recognised European social partner for the retail and wholesale sector.

We welcome the EDPB Guidelines and the effort to provide clear instructions. Nevertheless, we would like to point out some areas where further clarification is needed.

1. General questions

Article 3.1 GDPR

As the current guidelines seem to focus mainly on third country parties who fall within the scope of Article 3.2 **we would also appreciate any further analysis and example scenarios** regarding the transfer of personal data to a controller or processor in a third country who falls within the scope of Article 3.1, specifically if it has an establishment in the Union as highlighted in EDPB opinion 3/2018.

EU standard of essential equivalence

Under paragraph 3 of its Guidelines, the EDPB requires a level of protection which is '*the EU standard of essential equivalence'*. It is not clear to us where it is stated in the Article 44 of the GDPR that the level of protection should be essential equivalent[1]. Aren't we right to assume that article 46 (transfers subject to appropriate safeguards) requires appropriate safeguards for the processing activity and data sets at hand and does not require the country of the importer to offer an essential equivalent protection? This would concur with the wording in paragraph 21 of the Guidelines (adequate level of protection; appropriate safeguards). **We would appreciate further clarifications on this point.**

Second sentence article 44

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

[1] The EDPB refers to its own Recommendations (Recommendations 01/2020 and 02/2020)

It seems that the third criterium for a data transfer is based upon the first sentence of article 44 GDPR and on the CJEU Judgment Bodil Lindqvist[2]. We would like to clarify why the second sentence of article 44 was not included ("*All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined*")? This second sentence determines, in our view, the scope of the first sentence. **Could the EDPB elaborate if and in so far, the Lindqvist decision endorses the current view of the EDPB on the interplay of 3 and Chapter 5?**

Customized safeguards

In paragraph 23 is stated that the content of safeguards needs to be customized depending on the situation. We would like to highlight the need to avoid any kind of duplication and to ensure alignment with the recently updated transfer tool of the EC (SCCs).

2. Comments and questions on the 3 criteria

Criterion 1: *"A controller or a processor is subject to the GDPR for the given processing".*

Para. 25 of the Draft Guidelines further specifies that controllers and processors are under obligation to comply with Chapter V of the GDPR when they disclose personal data to controller or processor in a third country and this requirement applies to data exporters not established in the EU but subject to GDPR by virtue of Article 3, even when data importers are based in the **same** third country.

- This reasoning creates a paradoxical situation whereby a **California-based data controller, subject to GDPR by virtue of Article 3(2) would be placed under the obligation to comply with Chapter V of the GDPR when transferring personal data to its California-based data processor.**
- It is not entirely clear how such reasoning aligns with the understanding of "transfer" embedded in the relevant recitals of the GDPR, where transfers are considered to be data processing operations occurring when personal data is originally shared, from the geographical perspective, **"from the Union" to "third countries**", e.g.;
    - Recital 101: "(*w)hen personal data are transferred **from the Union** to controllers, processors or other recipients in third countries or to international organisations, the level of protection of natural persons ensured in the Union by this Regulation should not be undermined"*
    - Recital: 110: *"A group of undertakings, or a group of enterprises engaged in a joint economic activity, should be able to make use of approved binding corporate rules for its international transfers **from the Union** to organisations within the same group of undertakings"*

- It is also unclear how such reasoning aligns with the fundamental rationale of data transfer rules – to remedy the risks of data processing to data subjects arising from third country legislation and/or practices which do not guarantee a level of protection afforded by the EU law. If personal data is **already** processed in the third country which does not offer essentially equivalent level of protection (e.g., the US as in the example above)[3], **how, from the legal**

[2] CJEU Judgment of 6 November 2003, C-101/1, EU:C:2003:596

[3] It is also recording in Draft Guideline that even where processing falls under Article 3(2) of the GDPR, the protection can still be undermined by other legislation that the importer falls under.

standpoint, transferring data within the same jurisdiction could change the level of data protection, and what compensatory effect Chapter V data transfer rules are expected to have in this situation?

- It is unclear how transfer impact assessments would need to be conducted in this situation, and, from the policy perspective, it is doubtful if it is in line with the intention of GDPR drafters to expect the EU supervisory authorities to enforce GDPR Chapter V rules between two US (or any other third country) based companies.

Criterion 2 : *"(t)the controller or processor ("exporter") discloses by transmission or otherwise makes personal data, subject to this processing, available to another controller, joint controller or processor ("importer").*

- We recommend to clarify if a "**recipient**" as defined in Article 4(9) of the GDPR and as explained in EDPB Guidelines 07/2020 **could also be considered an "importer**", or the notion of "importer" is limited to independent and joint controllers and processors.

- We recommend to elaborate further on the **concept of disclosure "by transmission, or otherwise**" **and to explain which technical data sharing scenarios would qualify or not qualify as such disclosure.**
    - For instance the example used in the Guideline (example 1) pertains to data submitted which is necessary in the course of the performance of a contract. **Does the same apply to cookies and other direct transmitted/collected data for which the data subject has given its explicit consent or which is based on another legal processing ground?**
    - In examples 2-4, we recommend to elaborate further in order to make sure that they reflect diverse real-world practices of businesses sharing the data and include more details of data sharing arrangements.
    - It would also be useful to understand which specific data sharing scenarios would **not** constitute disclosure "by transmission or otherwise".
    - Lastly, many companies do not own the technical equipment needed for the actual transmission of data to a third country and need to make use it is provided by a communication service provider. That means that the data is firstly provided to the communication service provider in the same country as the exporter, which in turn forwards the data to a communication service provider in a neighboring country and so on, until the transmission to the actual importer is completed. It is important to note that the communication service providers are providing 'mere conduit' intermediate services. **Would the EDPB consider these "mere conduits" to not be part of "disclosure by transmission" processing operations and to not be included in the notion of a "transfer"?**

- Under paragraph 12 of the Guidelines, we read that Chapter 5 does not apply to a direct transfer from a data subject to a recipient in a third country (including a controller or processor in a third country who falls within the scope of Article 3). If a controller or processor is subject to the GDPR (article 3.2), it is subjected to all provisions of the GDPR, including to article 23 GDPR. Just as a direct transfer directly from a data subject to a processor or controller in a third country, which is subject to the GDPR (article 3.2), is not deemed to

undermine the level of protection guaranteed to natural persons under the GDPR[4], we are wondering why an indirect transfer from a processor or controller in the Union to a controller or processor subject to the GDPR (article 3.2), should be deemed to undermine the level of protection guaranteed to natural persons under the GDPR and require further safeguards. ***Could the EDPB elaborate further on why they fall under the scope?***

- *Example 4 – Processor in the EU sends data to a sub-processor in a third country*
  This is a quite common situation. Could the EDPB elaborate what applies in a situation where C is an affiliate of B?
- *Example 4 and BCR-Ps* (Binding Corporate Rules for Processors)
  Are we right to assume that B and C in example 4 can have a BCR-P ex article 47 in place to ensure there is no undermining of the GDPR as meant in article 44?
  If such a BRC-P is in place this can be used for transfer from the EU customer/controller to the processor in a third country, or via a third country processor to another third country processor of the same group of companies, or even via a third country customer/controller entity. Central to the use of a BCR-P is that the data – no matter which route is undertaken – is protected as stipulated in the BCR-P.[5] It therefore stands to reason that BCR-Ps can be used to ensure there is no undermining of the GDPR as meant in article 44.
- *Paragraph 14*
  We would welcome any clarification on what kind of obligations (practical implementations) Company A should meet.
- *Example 5*
  - We would welcome any clarification on what happens when a person remains an employee of the EU based entity but is temporarily stationed abroad and thus working for the EU employer and the third country entity and remotely accessing the database of the EU entity in both capacities (e.g. secondment)?

Criterion 3: "*irrespective of whether or not this importer is subject to the GDPR in respect of the given processing in accordance with Article 3"*?

We advocate for **a jurisdictional approach rather than a geographical approach**. This also coincides with paragraph 17 and 24 of the Guidelines in which the EDPB points out that if a certain data flow does not qualify as a 'transfer' the controller is still accountable for its processing activities and must comply with the GDPR, including for instance the obligation to implement technical and organizational measures depending on the risks involved. **Could the EDPB please explain why the sentence above is included in criterion three?**

Contact:
Savvina Papadaki - +32 456 35 6163 -papadaki@eurocommerce.eu Transparency Register ID: 84973761187-60

[4] This follows from the GDPR (article 4.10 and Chapter 5)

[5] See for more information on the BCR-Ps the Explanatory Document on the Processor Binding Corporate Rules, WP 204 rev.01: https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2015/wp204.rev_en.pdfl and an article of IAPP members L. Moerel (Professor of global ICT law at Tilburg University and senior of counsel with Morrison & Foerster) and A. van der Wolk (Global Co-Chair Privacy & Data Security with Morrison & Foerster): http://iapp.org/news/a/why-the-edpb-should-avoid-torpedoing-bcrs-for-processors/.