

**Public Consultations 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 – Adopted on 18 November 2021**

\*the present comment just reflects the personal view of its author.

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The Guidelines remarks the overarching purpose of GDPR application.

Indeed, the description of the interplay among Article 3 and Chapter V GDPR shows at least two crucial points:

- 1) the great potential application of GDPR provisions – at least in terms of comply with Article 32 GDPR technical and organizational measures and other primary GDPR provisions like Article 24, 32, 33, 35 ,48 GDPR - regardless the fact that occurs or not a transfer.
- 2) When occurring a transfer, the great potential application of GDPR provisions (also provisions of Chapter V GDPR) in terms of impacting several entities in the chain everywhere.

From the 7 examples indicated in the Guidelines, indeed, it is evident the fact that the GDPR will apply in the majority of potential scenarios (at least in terms of application of Article 32 GDPR and other primary GDPR provisions, regardless the configuration of a transfer and the consequent application of Chapter V GDPR).

It means that for the entity involved (controller, joint-controller or processor), it is always necessary to carry out at least a self- assessment in every potential scenario of transfer in order to evaluate the fulfilment of the substantial GDPR provisions also when it is understood that the Chapter V is not applicable because there is not transfer (this is clear from example 1 and 5 of the Guidelines).

Instead, when the transfer occurs it will be necessary for the entities to fulfil also the provisions of Chapter V GDPR. The Guidelines, highlight the fact that the interplay of Article 3 and Chapter V of GDPR generate a potential application to high number of potential scenarios: not only when the flow (transfer) is basic just among an EU entity exporter to a third country entity importer (example 2, 4, 6 of the Guidelines), but also when a flow consists of a sending of data back to the third country entity (example 3, 7 of the Guidelines). In addition, it is also important to note – as explained at para. 25 of the Guidelines - that the potential application of GDPR (pursuant to the interplay of Article 3 (2) GDPR and Chapter V GDPR), can occur also in a case where all the entities involved are in third countries (in the same third country or different third countries without any establishment in EU).

In conclusion, the interplay between Article 3 and Chapter V GDPR shows (once again) the overarching purpose of GDPR application and its extraterritorial effects.

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