

From:

Privacy Executives

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Woerden, The Netherlands, 27 December 2021

To:

European Data Protection Board

Rue Wiertz 60, B- 1047 Brussels

Subject: Response to Public Consultation of EDPB Guidelines 05/202.

Dear EDPB,

Hereby I wish to respond to the public consultation of the EDPB 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.

My feedback is in particular related to section 2.3, in which is explained that the 'third criterion' requires that the importer is geographically in a third country or is an international organisation, but regardless of whether the processing at hand falls under the scope of the GDPR.

Subsequently, Example 7 gives the example of a Company A, which is a controller without an EU establishment, offering goods and services to the EU market. The processing performed by Company A is covered by the GDPR, as to Article 3(2). Company A makes use of a Processor in the EU (a French 'Processor B') processing personal data on behalf of Company A. After the processing Processor B re-transmits the data to Company A.

The processing performed by Processor B is covered by the GDPR for processor specific obligations pursuant to Article 3(1), since it takes place in the context of the activities of its establishment in the EU.

Since Company A is in a third country, the disclosure of data from Processor B to Company A is regarded as a transfer to a third country and therefore Chapter V of the GDPR applies. In other words, one of the transfer mechanisms of Chapter V GDPR must be applied.

Standard Contractual Clauses (SCCs) pursuant to Art.46(2)(c) are by far the most used data transfer mechanism under the GDPR. The European Commission has published new SCCs templates in June 2021. These new templates consist of four (4) modules, of which Module 4 is provided for transfers of processors in the EU to controllers in a third country.

Question:

Is Module 4 of the new SCCs supposed to be used in situation comparable with Example 7 of the EDPB Guidelines 05/2021 (EU Processor B processing personal data on behalf of Company A established in a third country and re-transmitting it back to Company A)? This question at hand is relevant to be clarified in both situations, where:

1. the EU Processor combines the personal data received from the third country-controller with personal data collected by the processor in the EU; and
2. the EU Processor does not combines or enriches the data received, e.g. just hosting the data, or enrichment with non-personal data.

I hope you see the relevance of this question and clarify the usage of SCCs Module 4 in the final version of the EDPB Guidelines 05/2021.

With kind regards,

Andre Walter