Response
EDPB consultation 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

First, many thanks for the EDPB's work on this much-needed and important guidance. After one overarching point, my response below generally follows the order of the relevant paragraphs. These views are personal to me alone.

Article 3(1)

The Guidelines discuss Article 3(2) GDPR, particularly in paragraphs *3, 10, 12, 18, 24 and 25.* However, please could they also cover the position of a *non-EEA* controller/processor who is subject to the GDPR by virtue of processing personal data in the *context of activities of its EEA establishment* under Article *3(1),* like the US corporation Google Inc. in the *Costeja* CJEU case. Transfers to such non-EEA controllers/processors should also be discussed.

If the EDPB chooses not to cover the position of non-EEA controllers/processors subject to the GDPR under Article 3(1), please explain why - e.g., does the EDPB consider that such non-EEA organisations would not be receiving transfers because paragraph 12 of the Guidelines would apply to them? Is the EDPB confident that there would never be any circumstances where transfers could be made to such organisations, and that therefore no new SCCs are needed to cover transfers to Article 3(1) non-EEA organisations?

I would urge the EDPB to expand the Guidelines to cover transfers to non-EEA Article 3(1) organisations too, not just non-EEA organisations subject to GDPR under Article 3(2), and to call for the issue of SCCs to cover transfers to such organisations too.

Paragraph 7

Point 3 - thank you for clarifying that in the EDPB's view, even if the importer is subject to the GDPR under Article 3, there can still be a restricted "transfer" to it under GDPR (unlike the UK ICO's current view).

But please see further below regarding paragraph 18.

Paragraph 11

For clarity and comprehensiveness, please add to this paragraph wording along the lines of the text from para 13 of the EDPB's supplementary measures recommendations and *Schrems II* FAQs 11 (or at least cross refer and link to those documents from these Guidelines):
"Keep in mind that remote access from a third country (for example in support situations) and/or storage in a cloud situated outside the EEA offered by a service provider, is also considered to be a transfer"
"it should be borne in mind that even providing access to data from a third country, for instance for administration purposes, also amounts to a transfer"

Paragraph 12, paragraph 14 example 5 and paragraph 17

Thank you for your welcome clarification of remote access by an employee, and for promoting a consistent cross-EEA approach SAs to this type of situation.

In para.14, please also explicitly cover the "employee travelling with laptop" scenario, which has been much discussed - para.17 only suggests controllers may ban this practice. It would helpful if the EDPB stated clearly that physically taking a laptop to a third country (with the laptop remaining under the control of the controller's employee) is *not* a "transfer", just as remote access by the controller's employee from a third country is not a transfer.

Paragraph 13

This does not cover another possible situation: an EEA *sub*processor may need to transfer personal data "back" to a non-EEA processor. Please expand paragraph 13 to refer to that situation.

While the Commission's 2021 SCCs allow an EEA processor to transfer to a non-EEA controller, and an EEA processor to transfer to a non-EEA subprocessor, they *cannot* be used by an EEA *sub*processor to transfer personal data to a non-EEA processor. Please encourage the issue of SCCs to cover that situation too.

Paragraph 18

Further expansion of this paragraph is urgently needed please.

What is meant by an importer being "geographically in" a third country? Does this refer to the importer being a citizen of or legal entity incorporated under the laws of the third country?

Or just having a physical presence in the third country (and therefore being subject to the jurisdiction of that country, i.e. the third country's laws apply to it)? For instance, what if the "importer" is an *EEA-incorporated* company, e.g., a German company, that has a branch office (operated by the *same legal entity* i.e., the German company) in a third country? Is sending personal data to that third country branch office a restricted "transfer", even though there is no separate controller or processor receiving or being given access to the data as per paragraph 14? How can paragraphs 14 and 18 be reconciled in such a situation? Logically, a German company with a branch in the third country is "geographically in" the third country, as much as is a company incorporated under the laws of that country.

What difference if any does it make if the physical presence in the third country is that of the German company's subsidiary, incorporated under the laws of the third country (or indeed another country?

Is having a data centre in a third country (e.g. SWIFT in the Article 29 Working Party's 2006 opinion), or just servers in that country, the same as being "in" that country?

More clarification and concrete examples would be very helpful please.

All this underlines the difficulties with focusing overmuch on the risks of transfers to non-EEA importers who are subject to the jurisdiction of a third country - as even *EEA-incorporated organisations* may be or become subject to third country laws, if they expand their operations outside the EEA and therefore have branches/servers "in" third countries. It is not just third country-established organisations that risk being subject to conflicting third country vs. EU laws! (please see further this article).

Please also explicitly explain the relevance of the *physical hosting location* of personal data (even adding a statement to the Guidelines, such as "The physical data location is not relevant", would be helpful). What if the transferred data is in a different country from that "in" which the importer is located, e.g., personal data is sent to a Canadian company's US servers, or to a US company's Canadian servers?

Paragraph 23

"Therefore, when developing relevant transfer tools (which currently are only available in theory), i.e., standard contractual clauses or ad hoc contractual clauses…" - please clarify what's meant by "only available in theory"? Surely the 2021 SCCs are already available for use, they are not just available "in theory"?