

CLEPA comments on the European Data Protection Board's 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

CLEPA welcomes the publication of the draft guidelines. However, we feel that further clarification from the EDPB is necessary on a number of issues. The examples outlined below highlight the topics which would benefit from additional guidance.

Example 1

According to the EDPB guidelines 03/2018 on the territorial scope of the GDPR, the (intragroup) processing of personal data by a non-EU company could fall under the scope of the GDPR by virtue of art. 3(1) GDPR, as described in example 2 about the sales processing activities of a Chinese e-commerce company being inextricably linked to marketing and promotion activities performed by the EU office established within the same group of companies. The applicability of art. 3(1) GDPR is in our view particularly relevant for intragroup data processing where the EU company for example acts as a data controller and the non-EU subsidiary performs activities that are inextricably linked to the business operations of the EU company, for example a shared service centre located in India.

The transfer of data from the EU company to the non-EU subsidiary meets the criteria of Chapter V of the GDPR. The EDPB guidelines on the interplay between art. 3 and Chapter V of the GDPR seem to acknowledge in par. 23 that international data transfers to non-EU companies subject to art. 3(2) GDPR should benefit from the new set of SCCs which is still under development. But what about (intragroup) data transfers to non-EU companies within the scope of art. 3(1) GDPR? Could the EDPB confirm that its considerations as set out in par. 23 also apply also to art. 3(1) GDPR situations which should benefit from the new set of SCCs?

Example 2

Example 1 of the EDPB guidelines addresses the situation where the 2nd criterium for transfer qualification doesn't apply when the data subject directly provides the data to the non-EU company. Could the EDPB confirm whether the same conclusion applies in a situation where the data subject passes on personal data directly to a non-EU processor involved by the EU controller, for example the non-EU hosting company of a website receives account details from EU data subject that it processes on behalf of the EU data controller?

It should be made clear that, if there is a transfer, a transfer instrument is needed between the non-EU processor and the EU controller.

Example 3

An EU company subject to the GDPR transmits personal data to a non-EU company which is a branch of the EU company, i.e. the branch is not a separate legal entity but an extension of the legal personality of the EU company. Could the EDPB indicate whether this processing activity meets all the

criteria of a transfer and, if so, could the EDPB clarify whether this means that the EU company has to enter into SCCs with itself, even though the foreign branch in the third country remains subject to the laws of the European jurisdiction where the legal entity is formally established?

Paragraph 7.2 of the draft guidelines states that, to be qualified as such, a transfer implies that the “exporter [...] makes personal data [...] available to another controller, joint controller or processor.” Consequently, we understand that that the same legal entity cannot be “another controller,” and the example above should not be considered a transfer. Can the EDPB confirm this?

In addition, the foreign branch office would most likely receive access requests from foreign authorities, and the physical office might still be subject to foreign intelligence laws, while the EU company isn’t covered at by them all. In that scenario, would additional measures be in place to safeguard EU standards?

Example 4

An EU company acting as a processor transfers personal data to the non-EU controller. The dataset consists of records from EU and non-EU citizens. In our view, the non-EU controller falls under art. 3(2) GDPR with respect to the personal data of EU citizens and the EU company is subject to art. 3(1) GDPR for the whole set of personal data that it processes in its capacity as data processor with an EU establishment.

Could the EDPB clarify whether the entire data set should be covered by:

- 1) the (new) SCCs referred to in par. 23 as the non-EU controller is subject to art. 3(2) GDPR and the EU processor falls under art. 3(1) GDPR;
- 2) by the already adopted SCCs as the non-EU controller doesn’t have to respect GDPR democratic standards with respect to data of non-EU citizens; or
- 3) the (new) SCCs referred to in par. 23 to the extent the activity concerns transferring of records pertaining to EU individuals while the transfer of personal data from non-EU citizens should be safeguarded by the already adopted SCCs, meaning that the exporter and importer have to sign the 2 identical modules from both sets of SCCs?

Example 5

An EU company acting as a data controller develops and maintains connected devices available on the EU market which transmit personal data directly to the non-EU data importer acting as a sub-processor, involved by the EU data processor. Could the EDPB clarify between which parties the actual transfer takes place, i.e. the EU controller and the non-EU sub-processor (in line with the physical transfer) or the EU processor and non-EU sub-processor (in line with the contractual relationship)?

Do the previous answers change in case the processor is also located outside the EU?

Example 6

An EU company acting as a data controller involves an EU data processor. The data stays physically in the EU while the HQ office of the EU data processor is located in a third country. Could the sole fact that the HQ office of an EU data processor is located outside the EU, e.g. in the US, lead to the conclusion that an actual data transfer to a third country is occurring?

On 1 December 2021, in its [“Cookiebot” decision](#), the Administrative Court of Wiesbaden assumed that a transfer occurs even if data never leaves the EU, so long as the recipient of data may formally be subject to requests by non-EU authorities. The court reasoned that since data “are processed on Akamai servers, a data transfer to a third country is occurring,” simply because “Akamai Technologies Inc., as an American company, is subject to the CLOUD Act.” Can the EDPB clarify, since this approach appears different from its own definition of a transfer, i.e. a disclosure of data to an “importer” who is “in a third country.”

Example 7

Is there any further argumentation for why a processor in the EU needs to conduct SCC to transfer personal data of non-EU citizens to the controller in a third country, if the controller initially submits the personal data to the processor? In such a situation, non-EU citizens are treated like EU citizens which seems illogical given the fact that the EU processor acts on behalf of the non-EU controller.

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