COMMENTS ON 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 NOVEMBER 18TH 2021

The following comments on the "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 November 18th 2021 **are submitted by the students[1] of the LL.M Digital Law and Technology, Catholic University of Lyon (France) under the supervision of Jean-Marc Van Gyseghem, Senior Lecturer.**

1 Introduction

1. The guidelines aim at clarifying the interplay between Art. 3 and the provisions in Chapter V of the GDPR. However, they fail at resolving the uncertainty regarding the relationship between article 3 and Chapter V. Even if these guidelines present an important step forward to ensure the coherence and consistency of data protection law in the EU and beyond, they should elaborate more on the relationship between these two set of rules in order to emphasize the importance of their interplay. The guidelines regarding the interaction of the two sets of rules extending the applicability of the GDPR to third countries are absolutely necessary but they have to be clear, precise and sufficiently elaborated to assist the interpretation of the provisions in problematic cases.

2. It can be argued that applying the data transfer mechanism as per Chapter V to a foreign entity already subject to the GDPR is duplicative and in some instances contradictory, where the mechanism imposes equivalent, but not identical, rules. Hence, in cases where Article 3 already applies and imposes all GDPR rules on a foreign entity, is there a need for additional obligations? The Guidelines do not answer this question in a clear manner.

3. The guidelines solely refer to the Lindqvist decision. However, the question of the qualification of the transfer of data to a third country or international organization is not a new question and various bodies or sources (such as Convention 108 of the Council of Europe and EDPS on Article 9 of the Regulation (EC) 45/2001) have expressed themselves on this topic. Then, why would the EDPB only refer to this case law.

Furthermore, as the GDPR does not provide any definition for the transfer of personal data to a third party or international organization, controllers and processors subject to the GDPR are used to deal with these various sources to draw the line of the definition of a transfer to third country or international organization. The three criteria identified by EDPB may not cover exactly the definition known by the persons subject to the GDPR and for that reason might be incomplete. Therefore, the EDPB could have given more elements on this issue and if necessary, explained why the criteria set up by other sources were not considered (see Second criterion).

4. In cases where the GDPR is applicable and where the situation involves a transfer of personal data in the sense of Chapter V, the protection that is given by GDPR should be extended to also cover

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such a transfer. Following the wording of the GDPR, the protection under Chapter V should be at the same level as guaranteed by GDPR – it should not be lower, but it cannot be higher either. It is not up to the companies/actors whose activities fall under the scope of GDPR to "*complement the scope of GDPR*", to "*address the missing principles*" and "*fill the gaps in the protection*". It is reserved for the EU legislator to act and amend the text of the GDPR to give a clear explanation and detailed comprehensive guidance. One cannot ask the companies (even if those companies are as big and strong as GAFAM) to do the work of the EU legislator or to make them responsible for EU legislative failures.

5. Furthermore, the EDPB did not explain or give any example regarding the attribute "*international organization*", so that one keeps wondering what the purpose of including international organizations is and why they should be treated differently from "*third country data controllers*". In addition, it would be worth elaborating more on the special rules regarding these organizations. They are acting worldwide and therefore need a certain set of rules considering their geographically registered offices and how this affects the treatment regarding the data processing according to the GDPR.

None of the examples include transborder processing of data by international organizations; there should be examples of transborder data flow to international organizations to consult and covering at least the same extent as examples provided for the transborder data processing by entities in third countries.

2 First criterion: A controller or a processor is subject to the GDPR for the given processing

6. This first criterion is confusing. As the EDPB explained in its Territorial Scope Guidelines: "*The EDPB underlines that the application of Article 3 aims at determining whether a particular processing activity, rather than a person (legal or natural), falls within the scope of the GDPR. Consequently, certain processing of personal data by a controller or processor might fall within the scope of the Regulation, while other processing of personal data by that same controller or processor might not, depending on the processing activity.*"[2] Therefore, following the logic of the EDPB, under Article 3 GDPR it is all about the question whether the processing falls (or does not) under the GDPR, whereas under Chapter V GDPR it is about the controller/processor falling (or not) under the GDPR. Following this simple logic and the fact that Article 3 GDPR defines the scope of the territorial application of the entire GDPR and including Chapter V, such an interpretation is not coherent and does not seem to be correct.

7. The first criterion (paragraphs 9 and 10), "*a controller or a processor is subject to the GDPR*" does not call for many comments except that the criterion could be amended with the following sentence: *"irrespective of their establishment being in the EU or EEA"*. This is said in paragraphs 10 and 25. It would make the parallel with the third criterion and would recall the objective of these guidelines, namely the interplay between the territorial scope of the GDPR and the territory of the Union.

The EDPB sets this as the first criterion, which makes sense, since the protection of the GDPR shall only be extended to those whose data are already protected by the GDPR and this protection is threatened to be undermined by the data transfer to a third country. However, as laid down in Art. 3 (2), not only a data controller or processor who has his registered office in the EU, but also those from a third country – as long as the requirements in (2) are met – fall under the territorial scope of the GDPR. Within the first criterion, the EDPB does not differentiate these two cases. They only mention in a short sentence that the cases in Art. 3 (2) also apply without further explanation to why these two

[2] EDPB, Lignes directrices 3/2018 relatives au champ d'application territorial du RGPD (article 3), version 2.0, 12.11.2019,

cases should be handled equally. Ultimately, since in these cases data from EU data subjects are being processed, the provisions of the GDPR should be comprehensive and should not create a loophole for companies outside the EU to break the chain of obligation to comply with the GDPR and allow them to pass these data further. This risk exists if the case in (2) is treated differently from the (1).

8. By only mentioning Article 3 (2), the EDPB seems to forget Article 3 (3). In general, Article 3 (3) is absent throughout the guidelines. What are the reasons of such an absence? An oversight?

3 Criteria 2: This 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")

9. If the EDPB opinion is based on article 2 (2) (c) of the GDPR it is not clear how the EDPB came to the conclusion that the transmission of the data directly from the data subject would not constitute a "*transfer*". Neither the GDPR in general, nor Chapter V mentions anything in this regard. Article 44 GDPR speaks of "*transfer*" without specifying that it must necessarily be from controller/processor as "*exporter*" to controller/processor as "*importer*".

If we take an example proposed by the EDPB and apply their logic, then the following situations could occur:

- Maria, who is in Italy, transfers her personal data to a company in Singapore (assuming that Art. 3(2) GDPR is not applicable) – her personal data would not be protected by GDPR.
- Maria, who is in Italy, transfers her personal data to a EU's establishment of a Singaporean company – the situation would fall under Art. 3(1) GDPR and her personal data would be protected by GDPR.

In the two above situations the subject of potential protection is the same: the personal data of Maria who lives in the EU. Moreover, the subject potentially falling under territorial scope of GDPR is the same: the processing of the personal data of Maria who lives in EU. However, in the first situation the personal data has no protection, whereby in the second situation it has.

If we follow this interpretation of the notion of "*transfer*" proposed by the EDPB, then the very purpose of the GDPR – protection of personal data, especially when it flows outside EU – would be severely undermined.

10. In paragraph 12 it is mentioned, that if the data subject discloses on his/her own initiative his/her personal data, this second criterion is not met. As an aside, the EDPB could have, however, stressed out the fact that the data subject, even if he is domiciled in the Union, in this case, should be fully aware that his/her personal data might be not as protected as in the EU. All data of people domiciled in the territory of the Union can't be protected by the GDPR. European consumers should be very aware / informed of that.

It should be reminded that Recital 18 states that the GDPR "*applies to controllers or processors which provide the means for processing personal data for such personal or household activities*". This means that, even if we are in a personal or household activities, the GDPR might be applicable. The guidelines should be clearer on this point and avoid any discrimination between data subject according to the applicability of the GDPR (article 3) or the equivalent level of protection (Chapter V) or none of them.

11. The Guidelines are silent on the explanations of "*to send*" or "*to make available*" and make use of the word "*transmission*". So technically there could be a complex interpretation or implementation decisions when trying to establish a distinction between "*access*" to the personal data information and the "*transmission*" of the personal data information. Relevant explanations would be highly welcome.

4 Criteria 3: The importer is in a third country or 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

12. It is not uncommon for some entities to fall under both categories: Article 3 and Chapter V triggering their simultaneous application. Since the GDPR does not contain any provision regulating the interaction between those two sets of rules, it is still not fully clear what legal duties apply in such a situation. We agree with the EDPB guidelines with regards to transfer tools and their main focus to address existing gaps and not to duplicate efforts with already existing GDPR obligations. It is also crucial to encourage the development of a transfer tool for those cases where the importer is subject to the GDPR for a given processing pursuant to Article 3(2).

Furthermore, it seems correct that the Guidelines retreat from the previous EC position[3] where it excluded the use of SCCs in cases where the GPDR is already directly applicable – Art.3(2). In this regard, it is worth noting that the EDPB takes a somewhat different stance when it states that "*the provisions in Chapter V are there to compensate for this risk and to complement the territorial scope of the GDPR as defined by Article 3 when personal data is transferred to countries outside the EU*" and that the assessment of supplementary measures also applies to situations falling under Article 3(2).

The EDPB stresses the need to ensure that data transfer tools provide essentially equivalent protection under the GDPR and states that it *"applies also in situations where the processing falls under Article 3(2) of the GDPR…"*. The need of this type of tools creates another level of complexity for organizations. It seems at the moment that entities may no longer rely on the old SCCs for new transfers, nor can they rely on the new ones when subject to Article 3(2) which brings more difficulties.

It appears logical that in situations where personal data falls under Art. 3 GDPR and therefore is protected by the GPDR's general tools, it should be sufficient and no "*additional*" tools under Chapter V are needed. Therefore the "*additional*" tools under Chapter V should be reserved for different types of situations, which do not enjoy "*full*" protection of the GDPR under Art. 3; i.e., their application should be complementary. Otherwise, the very existence of Chapter V is questionable. Why do we need Chapter V if the general provisions of GDPR are supposed (at least in theory) to provide the most comprehensive protection of personal data?

The EDPB fails to explicitly answer the question whether the safeguard measures of Chapter V are possible in situations where a processor or controller outside of the EU is also subject to the GDPR.

13. The guidelines highlight the criterion "*separate controllers*" in example 6 of paragraph 16. This only concerns the case of a subsidiary and parent company. The EDPB, however, does not further explain how the case including branches which do not have separate legal personalities should be handled. Following the fundamental principles of the GDPR, it immediately suggests that there will be no transfer in the case where a branch discloses data to the head office. However, since such cases are quite common in practice, it is certainly worth mentioning or giving an illustration in the guidelines.

[3] In its Implementing Decision on the new SCCs)issued in June 2021, the Commission seems to disallow their use for transfers to non-EU parties that offer goods or services to individuals in the EU or monitor their behaviour and are thus subject to the GDPR under Article 3(2). A similar position is taken in the Commission's proposed decision on the adequacy of data protection in the Republic of Korea (see Recital 7).

5 Consequences

14. Paragraph 24 of the guidelines seems to restrict the notion of data '*transfer*' to the limited set of activities outlined in this guidance, indicating that anything other than defined here is not a transfer and therefore not subject to Chapter V of the GDPR. What is created is thus an exhaustive and exclusive list. This limits the utility and protection of the GDPR and does not take into account other advances in technology that may not yet be accounted for in the manner in which data transfer is defined in this guidance. Therefore, this list of '*transfer*' activity should be considered as a minimum list and that other transfer mechanisms should be considered for inclusion on a 'case-by-case' basis, which would allow the use of this guidance as a non-exhaustive and potentially inclusive list.

6 Conclusions

15. All in all, we think that these EDPB Guidelines can be a useful tool. However, one main question remains unaddressed: How will the provisions of Chapter V be implemented, applied and enforced, especially in the context of third countries or international organizations. Furthermore, it is to say that the guidelines do not necessarily contribute to the clarification of Chapter V and its interplay with Article 3 because they leave major issues, as mentioned above, unaddressed.

16. The EDPB "*stands ready*" to help to "*fill the gaps relating to conflicting national laws and government access in the third country as well as the difficulty to enforce and obtain redress against an entity outside the EU*". To whom is this call addressed? To the European Commission that will have to elaborate a new set of standard data protection clauses? To the representative of such undertaking whose role is not even mentioned in this section or throughout these guidelines? To the supervisory authority? It only appears to be a call for further guidance and new binding arrangements that the representative of such undertaking (Article 3 (2)) will have to comply with.

17. To summarize from a practical point of view, the Guidelines bring some light for international companies in providing protection for cross-border activities. The Guidelines also deal with issues important for individuals who wish to know how their data is protected internationally. They seem to work as a pragmatic compromise addressing the duplication of obligations and emphasizing the importance of compliance tools.

On the other hand, considering the lack of clarity and gaps in the protection regime, they can be perceived as a missed opportunity to modernize the GDPR. Such *ad hoc* actions as guidelines or EC decisions do not seem sufficient to deal with such complex matter as international transfers. A single set of provisions covering both extra-territorial scope and international transfers may be considered with an amendment of the GDPR itself. To support this adaptation a study might be conducted to analyse the interaction of Article 3 and Chapter V in practice.