Computer & Communications Industry Association
Tech Advocacy Since 1972

Computer & Communications Industry Association (CCIA Europe) Submission to European Data Protection Board (EDPB) on Consultation on Guidelines 05/2021: Interplay between Article 3 and the provisions on international transfers of the GDPR

31 January 2022

1. Introduction

The Computer & Communications Industry Association ('CCIA Europe') welcomes the opportunity to comment on the draft guidelines of the European Data Protection Board ('the Board') on the interplay between the application of Article 3 and provisions on international data transfers under the General Data Protection Regulation (Guidelines 05/2021).

CCIA Europe takes note that the Board has chosen to take a geographical approach to define the notion of "transfer" under the GDPR, taking into account three cumulative criteria: GDPR applies to at least one of the parties, data is disclosed to an importing party, and this party is located in a third country. Where there are no 'transfers' as defined by Guidelines 05/2021, CCIA Europe generally agrees that a controller should nonetheless be held accountable for all processing under its control, including when the processing abroad carries demonstrated risks for individuals' personal data.[1] Other helpful clarifications include the exclusion of scenarios where a data subject directly provides his or her personal data to a controller for instance.[2]

While we generally accept the overall approach that the Board has taken in defining the notion of transfer, the draft Guidelines in its current form and the existing transfer mechanisms or lack thereof raise obvious compliance challenges for some data importers and their respective exporters. The draft Guidelines may also set forth duplicative obligations for EU processors as well as any processing performed in adequate jurisdictions.

You will find below further explanation, and we provide several suggestions to clarify the relevant sections of the draft Guidelines accordingly.

[1] Paragraphs 5, 15, 24
[2] Paragraph 12, Example 1

2. Transfer scenario: Recognise compliance efforts by data importers directly subject to GDPR pending new SCC

While the draft guidelines suggest that data importers that are subject to GDPR by virtue of Article 3(1) or (2) should be using transfer mechanisms under Chapter V GDPR, including Standard Contractual Clauses, the Board is also aware that Recital 7 of Commission Implementing Decision (EU) 2021/914 explicitly prevents the same data importers from using the SCCs set forth in the annex of the said decision.

Whilst we appreciate the Board's all-encompassing approach, the legally binding nature of the implementing decision (EU) 2021/914, the repeal of the former Standard Contractual Clauses,[3] and the absence of a new set of Standard Contractual Clauses for those scenarios would leave some data importers and their respective data exporters unable to use Standard Contractual Clauses for their data transfers. This legal vacuum would effectively prevent any transfers where parties cannot rely on adequacy decisions.

Pending the release of new Standard Contractual Clauses for non-EU data importers that are subject to GDPR, CCIA Europe invites the Board and Supervisory Authorities to recognise parties' efforts to update their existing Standard Contractual Clauses in light of the Schrems II decision. In this respect, we would also suggest revising paragraph 23 of the draft Guidelines which appears to suggest that there are no transfer tools available for non-EU data importers subject to Article 3(2) GDPR (e.g. "only available in theory"). Contrary to this suggestion, Standard Contractual Clauses concluded before 27 September 2021 remain valid until 27 December 2022 under Article 4 of Commission Implementing Decision (EU) 2016/679.

Where there are no existing Standard Contractual Clauses between parties in those scenarios, the Board and its Supervisory Authorities may wish to augment paragraph 23 and consider to what extent parties have sought to address the substance of the Schrems II decision, irrespective of the form or the instrument used. For instance, parties may be able to address their respective obligations either via updating former Standard Contractual Clauses updated in light of Schrems II ruling , ad hoc clauses, a joint controllership agreement (Article 26), a controller-processor agreement (Article 28), or any other binding agreement which implement security provisions under Article 32. Similarly, the suggestion that parties falling in an Article 3(2) scenario should avoid "duplicat[ing] the GDPR obligations" should be revised. Contractual duplication of statutory obligations is common practice, the new SCCs being a prime example of this reality. We fail to understand why it would be acceptable for some parties to be able to "duplicate GDPR obligations" by using the new SCCs, but parties falling under the Article 3(2) scenario should be discouraged from doing so.

[3] Except for contracts concluded before 27 September 2021 for which existing SCCs remain valid until December 2022.

In any and all cases, we strongly encourage the Board and Supervisory Authorities to refrain from penalising companies which have sought to comply with Schrems II but have not been afforded an appropriate transfer mechanism under Chapter V.

3. No transfer scenario: Preserve the integrity of the adequacy status

While CCIA Europe generally agrees that a controller should be held accountable for all processing under its control, paragraph 17 as currently worded suggests controllers to consider "supplementary measures" for processing operations in a third country when there are no "transfers" involved.

This would bring a great deal of confusion for companies processing personal data (i) in adequate jurisdictions or (ii) pursuant to a controller-processor or joint controller agreement.

Under this paragraph, a Japanese controller receiving data directly from the data subject and hosted by a Canadian processor not established in the EU might have to consider "supplementary measures" under Article 32. Since an adequacy decision already provides for an equivalent level of personal data protection to that of the EU, we suggest that the Board clarifies that the adequacy of a third country and safeguards similar as those enumerated in Article 46 GDPR will be a relevant factor even if there is no "transfer" situation.

In addition, this paragraph could be read to extend the use of "supplementary measures" to situations where a controller-processor or joint controller agreement is in place and there is no "transfer" taking place. We invite the Board to clarify that, where there are no transfers involved, the technical and organizational measures under Articles 24 and 32 or any other relevant provision under Chapter IV should not entail the use of supplementary measures.

4. Clarify the position of joint controllers

CCIA Europe would welcome some clarification on whether the transmission and disclosure of data between two or more controllers which jointly determine the purposes and means of processing would constitute a transfer. On the one hand, paragraph 15 explains that there is no transfer under Chapter V when data is processed by the "same controller/processor" across different countries. On the other hand, paragraph 16 suggests that a transfer does occur for "separate" controllers within the same corporate group. But no paragraph explicitly refers to a situation of joint controllership under Article 26 GDPR.

5. Avoid duplicative obligations for EU processors

Example 3 may be unnecessarily confusing and duplicative for EU processors and their non-EU controllers. According to this example, the transmission of non-EU personal data from XYZ Inc., a non-EU controller, to EU-based processor ABC ltd cannot constitute a transfer since the importer is established in the EU. However, the transmission from ABC back to XYZ would constitute a transfer. In other words, there is no transfer if the data flows one way, but there is a transfer if the same data flows the other way.

To avoid any unnecessary confusion or overlapping obligations under Chapter V and relevant obligations for processors, we suggest the Board consider limiting the scope of "transfer" to new data that has not been previously disclosed by the EU processor to the non-EU controller.

6. Consider a risk-based approach for remote data access

While paragraph 14 of the draft guidelines confirm that remote access is tantamount to a "transfer" under Chapter V, we invite the Board to consider that the probability of third country government data access and the risks for data subjects' rights are, in practice, significantly lower when remote access involves no material transfer, and the data is technically and exclusively stored in the EU.

7. Clarify that GDPR, including Chapter V, does not apply where non-EU controllers are not subject to Article 3(2) and the subsequent processing is performed by another party not established in the EU

In situations where a data subject directly provides his/her personal data to a controller that is not established in the Union and that is not subject to Article 3(2) GDPR, it would be helpful to clarify that the controller need not comply with Chapter V if the controller transmits personal data to another party located outside the EU (e.g. processor, separate or joint controller).

In example 1, if the Singaporean company concludes that it is not subject to Article 3(2) GDPR, it should not have to comply with Chapter V if its online shop is hosted by a processor established outside the EU for instance.

We believe that this is in line with Article 3(1) GDPR, and consistent with EDPB Guidelines 3/2018, and section 2.1 of the present guidelines.

*
* *

For further information, please contact Alexandre Roure, Director of Public Policy: aroure@ccianet.org