

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

Feedback in the public consultation by ELIXIR-Luxembourg

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Introduction

The EU General Data Protection Regulation (GDPR) does not provide a definition of what constitutes “transfer to a third country or international organisation”. The phrasing in itself is misleading for many as it seems to refer to a physical re-location of data. The rulings of European Court of Justice (CJEU) such as the CJEU *Lindqvist* case¹ relates to Directive 95/46/EC. This limits their applicability in the interpretation of “transfer to a third country or international organisation” because the approach to the territorial scope has changed fundamentally between the Directive and the GDPR.

- The Directive builds on a territorial scope, which is connected to the physical location – the establishment of an entity on the territory of the EU or where the processing infrastructure is located in the EU.
- The GDPR on the other hand emphasises more the legal establishment of an entity within the EU, not referring to the actual territory and even stating that the GDPR will apply to the processing of such entity irrespective of where the processing takes place. The concept has changed from a territorial location to a legal association of an entity. Consequently, in the GDPR, international organisations are now also covered by transfers in Chapter V while the Directive considered only transfer to third countries. The GDPR further changes the previous territorial concept as it becomes also applicable to certain processing related to data subjects residing in the EU.
- GDPR Art. 44 states that for the transfers considered, data are “*undergoing processing or are intended for processing after transfer*” by the recipient. This separates a transfer from an undirected disclosure on the internet (data made public), a distinction that was not made in the Directive and was thus subject to the CJEU interpretation.

Consequently, there is currently no guidance on the interpretation of “transfer to a third country or international organisation” that controllers can build on. Therefore, it is welcome that the EDPB has aimed at a clarification of what constitutes a transfer that is subject to Chapter V. In the following, we would like to discuss that the interpretation of EDPB is only one possible definition and that another approach could be considered as well, leading to a more consistent applicability of Chapter V.

¹ CJEU - Case C-101/01 - Bodil Lindqvist

Definition of transfer by EDPB

EDPB proposes in the Guidelines 05/2021 a definition for the term “transfer of personal data to a third country or to an international organisation”.

The first criterion in the Guidelines refers to the applicability of the GDPR to a given processing by a controller or processor. The second criterion suggests that a transfer requires the disclosure by transmission, or otherwise making available, of personal data by that controller or processor subject to the GDPR to a “data importer”. Following the third criterion, this transfer is seen as a transfer to a third country or international organisation and thus subject to Chapter V if the recipient importer is geographically in a third country or is an international organisation.

In this approach, a transfer within the meaning of Chapter V takes place irrespective of the recipient being subject to the GDPR for the ongoing or intended processing. Consequently, it is concluded by EDPB that Chapter V safeguards would have to apply to any such transfer, even if it takes place between entities in third countries but subject to the GDPR due to the nature of their processing. The obligation to apply Chapter V is even extended to an EU processor (re-)transmitting data to its controller.

This interpretation of the transfer, in particular following the third criterion, seems to reflect still a strong geographical location approach as envisaged in the Directive, where the location of an entity is decisive in addition to being legally independent (second criterion). Correspondingly, EDPB states in para 3 that for personal data processed on EU territory, the GDPR would be applicable. However, the actual location of the processing should be less important according to the GDPR. Focussing on the location of the establishment of an entity outside the EU only seems to invert the criterion in GDPR Art 3(1) for the applicability of the GDPR, as all entities not established in the EU or being an international organisation are “outside” in the meaning of Chapter V. No motivation for this interpretation is given. However, as shown in the following, the application of the EDPB definition of transfer in the meaning of Chapter V leads to some unconvincing scenarios that depend highly on normally non-decisive differences in the processing.

Implications of the definition by EDPB

Following the above definition and subsequent interpretation means that a third country controller can lawfully process data under its own legal framework but would become partly, i.e. for the re-transmission of data, subject to EU law for this processing by engaging a processor based in the EU. Regaining access to its data previously shared with the EU processor would no longer be lawful unless Chapter V measures are considered. (Example 3) This means a non-EU entity not operating under the GDPR could not use a cloud provider in the EU without becoming subject to Chapter V for access to its data.

The implementation of such a requirement, that an EU processor has to apply Chapter V to apparently any disclosure to a non-EU recipient, is not matching the understanding that the processor only has to comply with the GDPR with respect to its obligations as processor.² Art. 28(3)(a) indicates that the processor has to comply with the instructions of the controller, including for *transfers of personal data to a third country or an international*

² See e.g., Art. 4(16)(b) *that the processor is subject to specific obligations under this Regulation.*

organisation, unless required to do so by Union or Member State law to which the processor is subject. According to EDPB, the processor could not follow the instruction for such transfer by default unless the controller would introduce Chapter V measures, despite the fact that its processing of personal data is not subject to the GDPR. In particular, the processor could not, as required by Art. 28(3)(g), at the choice of the controller, return all personal data to the controller after the end of the provision of services relating to processing.

Another notable situation is where the controller is located geographically outside the EU but subject to the GDPR for its processing. Here, it is to be recalled that EDPB states in para 1 of the Guidelines 05/2021 that the overarching purpose of Chapter V is to ensure that the level of protection guaranteed by the GDPR is not undermined when personal data are transferred to third countries or to international organisations.

In this context, it is not intuitive why the GDPR should provide sufficient protection where a controller in a third country processes data for the provision of a service but this would not be the case where the data for the very same processing are accessed through an EU processor, as in this case, only the controller-processor measures would have to be considered. In terms of practical consequences of such requirements to the processing, it may mean that third country controllers will rather host data with processors outside the EU to avoid their processing being impacted. In this case, the rules are encouraging the physical transfer out of the EU, which would likely lead to higher risks for the data subjects.

There are other scenarios that lead to surprising consequences. A potential situation is the provision of services by joint controllers based in third countries offering services to EU citizens. They would have to implement Chapter V where they disclose the data between each other despite both being subject to the GDPR and potentially even located in the same country. Once again, no such concerns would be applicable if no data is disclosed between these partners. They could collect the same data independently and process them legally for their purposes. The processing would in both cases take place entirely with the same partners and within the same country and be legal, whereas Chapter V measures would be needed if they disclose the data among each other.

Another counter-intuitive processing situation occurs where an entity has a branch outside the EU. If that entity receives data from another controller inside the EU and discloses it to its non-EU branch, none of these processing situations would constitute a transfer subject to Chapter V. However, where the disclosure happens directly from that controller to the non-EU branch, Chapter V would be applicable.

An alternative definition of transfer to a third country or international organisation

We invite EDPB to consider an alternative definition to meet the above challenges of inconsistent applicability of Chapter V. This alternative definition implies that Chapter V only has to be applied where there is a substantial change in the nature of the processing situation and the associated risk, such as where the engagement of a processor changes the applicable law for the processing.

The following consideration is assumed. A “transfer” is generally defined as moving something or someone from one place to another. However, to process data by an entity, it is not required that this entity physically hosts the data. A transfer is therefore not seen as

the physical transmission of data from one entity to another. So, if a transfer does not mean a physical relocation of the data, what is then being transferred?

EDPB states in para 8 that *the application of the GDPR must always be assessed in relation to a certain processing rather than with regard to a specific entity*. The entity processing the data is not decisive but – in line also with Art. 3 – the applicable legal framework is.

Therefore, we would like to suggest the following definition: a *transfer of personal data which are undergoing processing or are intended for processing after transfer* takes place **where the legislative framework applicable to the processing moves from the GDPR to a different legal framework**, i.e. that of the third country or that of an international organisation [which is the reason why international organisations were included in the GDPR]. Such a change of the applicable legal framework takes place where:

- a controller whose processing is subject to the GDPR makes data available to a controller or processor not subject to the GDPR;
- an EU processor engages a subprocessor not established in the EU or an international organisation, irrespective of the overall processing being governed by the GDPR or not (depending on the establishment of controller and/or the nature of the processing). In this case, not the overall processing itself is governed by the GDPR but instead its operations as processor. The processor is required to pass down its own obligation to the subprocessor. Involving a subprocessor not subject to EU law means that there is a change of the legal framework governing the processor that will not be operating under the GDPR.

Implications for the above scenarios

When applying the proposed alternative definition, some of the counter-intuitive scenarios above could be solved. In particular, a controller outside the EU would no longer be discouraged to use a processor within the EU. The alternative definition has the following consequences:

A third country controller can use a cloud service based in the EU without becoming subject to Chapter V.

An EU processor engaged by a third country controller will only have to fulfil its obligations as a processor but not interfere with the lawful processing of the controller operating under a different legal framework.

No additional measures are needed where joint controllers operate under the GDPR, irrespective of place of their establishment.

A controller or processor established in the EU will always have to apply Chapter V when engaging a processor outside the EU. The same applies to a controller not established in the EU but whose processing is subject to the GDPR.

Conflicting legal frameworks

EDPB refers in para 23 to the need to have tools for conflicting legal frameworks. While we agree that the situation of conflicting laws applicable to a controller or processor needs to be solved, we would like to suggest that the challenge cannot be covered sufficiently through Chapter V provisions.

The simultaneous applicability of GDPR and a parallel foreign law is by no means limited to entities established outside the EU. Therefore, the definition of EDPB for a transfer subject

to Chapter V will not be sufficient to cover the cases where the simultaneous application of conflicting laws may affect the protection envisaged by the GDPR. An example is the US Cloud Act, which is applicable to subsidiaries of US based mother companies irrespective of where these subsidiaries are based. Also, entities exclusively established in the EU may become subject to foreign legislation with implications on the data processing where they pursue business outside the EU. In addition, data disclosures within the same legal entity but to a branch outside the EU may lead to the applicability of conflicting legislation.

As proposed above, a transfer in the meaning of the GDPR may refer to a change from the GDPR to a different legal framework. In case of conflicting legal frameworks, a non-EU legislation and the GDPR apply to a processing at the same time. This is notably the case where a third country controller or processor processing under the GDPR is required by law to respond to a request for data disclosure by the government. Such disclosure would likely constitute incompatible further processing and would therefore be prohibited.

The analysis implies that the matter of conflicting legal frameworks is independent of transfers under Chapter V and needs to be addressed on its own rather than in the context of transfers to third countries. Consequently, it may equally apply to entities established in the EU. Conflicting laws should be considered as a challenge in itself covering also processing by EU controllers and processors or non-EU controllers subject to the GDPR, not only a conflict as an effect of a transfer of data. Such separate consideration may lead to a revision of the GDPR as currently, the GDPR remains silent on such cases.