Submission to the public consultation regarding the European Data Protection Board 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 18 November 2021.

by Claire EM Jervis
King's College London

I would like to bring the following article I wrote which was published in IDPL on 6 December 2021 to attention of the European Data Protection Board:

International Transfers: Johnson v Secretary of State for the Home Department [2020] and Diplomatic Missions, Claire E M Jervis, International Data Privacy Law

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1. The European Data Protection Board may like to consider some of the issues raised there when considering its Guidelines, in particular the following:

(i) In my view a transfer for the purposes of Chapter V GDPR envisages a disclosure of data to a separate legal entity that is *subject to the jurisdiction of a State where [European] data protection standards cannot, in practice, be maintained*. I think this wording offers a more nuanced description of the problem Chapter V and Article 3 GDPR are trying to address and its solution.

(ii) Linked to this, in my view further clarification is needed of the final criterion 3 in the proposed Guidance (paragraph 7). For example, in my view an international transfer would occur where a government ministry of an EU Member State disclosed personal data to the diplomatic mission of a third country located in that Member State even though geographically that entity is in the same territory as the exporting controller. In short it is the ability of the State where data are being processed to exercise jurisdiction in respect of that data that matters rather than its geographical location.

(iii) A transfer from an EU controller to an International Organisation in an EU Member State is a transfer for the purposes of Chapter V. Thus, regardless of whether the GDPR applies to the International Organisation itself[1] the exporting EU controller must comply with Articles 44-49 GDPR in respect of the transfer. This point is made in the European Data Protection Board Guidelines on territorial scope. What is not addressed, however, is the point that in practice, the EU controller may find it difficult to comply with Chapter V because, for example, absent any adequacy decisions in respect of International Organisations, putting in place appropriate safeguards is likely to compromise the immunity and inviolability of the International Organisation and as a result is likely to be resisted by the International Organisation–see in this regard Claire EM Jervis - With WHOm can I share data? Applying the GDPR to transfers of data to International Organisations https://www.ejiltalk.org/with-whom-can-i-share-data-applying-the-gdpr-to-transfers-of-data-to-international-organisations/. This means that in most cases the only feasible option when sharing data with an International Organisation will be to rely on Article 49 GDPR. Given the strict position of the European Data Protection Board regarding the use of derogations this may give rise to difficulties. The European Data

[1] Here the key point is that even if the GDPR does apply to the International Organisation (and as a matter of public international law, it arguably would (as the host state enjoys territorial prescriptive jurisdiction) even if there is debate about whether as a matter of construction of the GDPR it does) the immunity it enjoys is likely to preclude its enforcement.

Protection Board's approach to derogations may, therefore, require a more nuanced approach.

2. Regarding Example 3: Processor in the EU sends data back to its controller in a third country

XYZ Inc., a controller without an EU establishment, sends personal data of its employees/customers, all of them non-EU residents, to the processor ABC Ltd. for processing in the EU, on behalf of XYZ. ABC re-transmits the data to XYZ. The processing performed by ABC, the processor, is covered by the GDPR for processor specific obligations pursuant to Article 3(1), since ABC is established in the EU. Since XYZ is a controller in a third country, the disclosure of data from ABC to XYZ is regarded as a transfer of personal data and therefore Chapter V applies.

There are two issues with this example, one of which is legal, one of which is not. In terms of the legal difficulties, the first concerns the ability of the processor to comply with the obligations on processors in the GDPR in this context in practice. One of those obligations includes the obligation to enter into a contract with the controller the content of which is prescribed by Article 28(3) GDPR. A number of the provisions envisaged by Article 28 GDPR do not work where only the processor is subject to the GDPR and the controller is not. Another issue relates to breach notifications in Article 33. There the processor's obligation (in Article 33(2) GDPR) is to notify the controller of a data breach. However, the non-EU controller that is not subject to the GDPR has no corresponding obligation to notify any Supervisory Authority of the breach.

The non-legal point is that this interpretation is likely to deter non-EU companies from using EU based processors because of the additional burdens and practical hurdles it creates for them and because it seeks to impose GDPR standards on them by the back door.

3. Re Example 5: Employee of a controller in the EU travels to a third country on a business trip
George, employee of A, a company based in Poland, travels to India for a meeting. During his stay in India, George turns on his computer and accesses remotely personal data on his company's databases to finish a memo. This remote access of personal data from a third country, does not qualify as a transfer of personal data, since George is not another controller, but an employee, and thus an integral part of the controller (company A). **Therefore, the disclosure is carried out within the same controller (A).** The processing, including the remote access and the processing activities carried out by George after the access, are performed by the Polish company, i.e. a controller established in the Union subject to Article 3(1) of the GDPR.

The point here is that it is confusing to state a 'disclosure is carried out within the same controller' – disclosure – as is made clear in paragraph 14 – must be taken to mean revealing data to a different controller – it is not a disclosure if it is a transmission of data within the same controller. Some other term should be used – transmission perhaps captures it.

4. Re the suggestion that 'for a transfer of personal data to a controller in a third country less [**note that this should read 'fewer'**] protection/safeguards are needed if such controller is already subject to the GDPR for the given processing':

While on the face of it this is a pragmatic response to the fact that the importer is subject to the GDPR, it further complicates an already extremely complicated data protection regime. If the difficulty concerns enforcement against the controller outside the EU, then could a contractual indemnity given by the non-EU controller be used to provide compensation to the data subject?