

# Comment on Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfer as per Chapter V of the GDPR

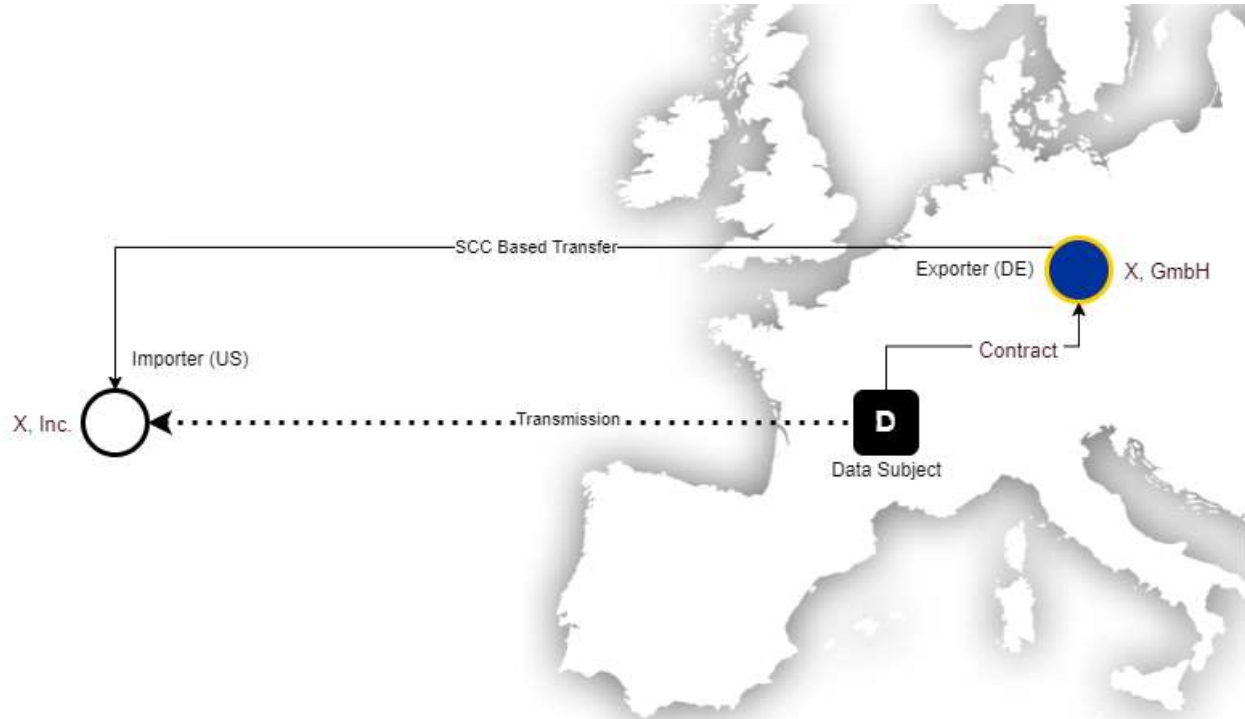
Submitted by: **R. Jason Cronk**  
Privacy Engineer and Consultant  
Enterprivacy Consulting Group  
<https://enterprivacy.com>



The guidelines need to provide an example which is a very common scenario:

A consumer data subject (located in the EU) registers with an online service. The service is being offered by a company in a third country, thus placing the company under the territorial scope of GDPR via Art. 3.2(a). However, when registering for the service, the data subject enters into an agreement with a subsidiary of the company located in the EU. For avoidance of doubt, the subsidiary in the EU, never possesses personal data of the data subject. It appears, in this scenario, that there is a legal “transfer” from the subsidiary in the EU to the parent company in the third country.

## Example I

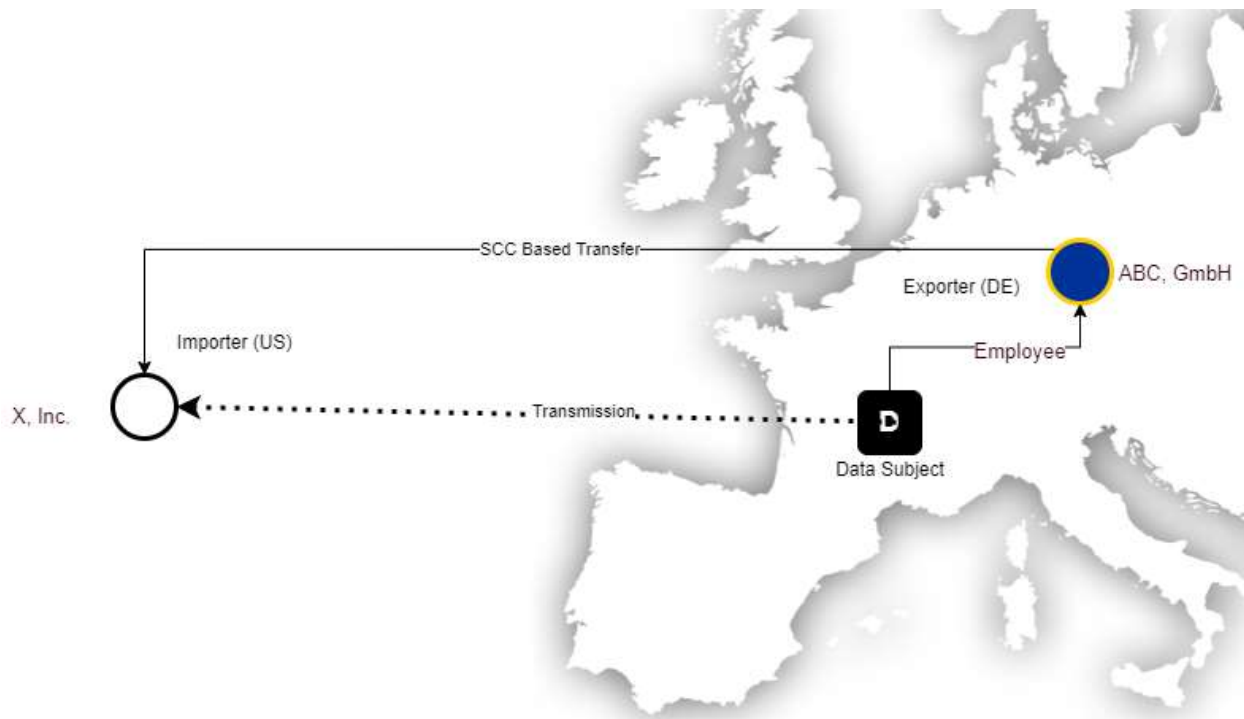


*In the example illustrated above, a data subject contracts with X, GmbH (in Germany) which is a European Union based subsidiary of X, Inc (in the United States). However, the data subject never*

actually supplies personal data to X, GmbH as the data subject directly transmit data to X, Inc. in the United States. This is a Chapter V transfer of data requiring a transfer tool. X, GmbH and X, Inc. use standard contractual clauses in place governing the transfer of data. X, GmbH is the exporter and X, Inc. is the importer.

A similar scenario exists when a business in the EU directs its employees to use an app (such as for Human Resource purposes) which is provided by a vendor in a third country which monitors the behavior of the employees (such as job time tracking), thus subjecting the vendor to GDPR under Art 3.2(b). Even though the employer never holds the data, this still appears to be a transfer under the guidance (“otherwise makes personal data available”). A clarifying example in the guidelines be helpful.

### Example II



ABC, GmbH (in Germany) instructs employees to use a service provided by X, Inc., in the United States. Employees' behavior is tracked via the service provided by X, Inc. thus X, Inc. is subject to GDPR for the data under Article 3.2(b). Because ABC, GmbH is “mak[ing] personal data, subject to this processing, available to...” X, Inc. via instructions to its employees, there is a transfer of data under Article V. ABC, GmbH and X, Inc. execute the standard contractual clauses with ABC, GmbH as the exporter and X, Inc. as the importer.

Respectfully submitted,

R. Jason Cronk

