

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

Comments

Generally, the Guidelines themselves are clear with respect to the determination of when the transfer of personal data to a third country (or to an international organisation) actually takes place.

However, it is hard not to look at these guidelines without a wider context surrounding the said transfer. Namely, the provisions of Chapter V of Regulation (EU) 2016/679 (GDPR), EDPB Guidelines 3/2018 on the territorial scope of the GDPR, and the Commission Implementing Decisions (EU) 2021/914 and (EU) 2021/915.

Perhaps the formulation of these guidelines would be a good opportunity to clarify certain practical aspects of transfers to recipients established in third countries.

1. Firstly, the factor of existence of the *'adequacy decisions'* (pursuant to Art 45.1 GDPR) has obviously not been adequately considered in the aforementioned guidelines and decisions.

I can see an issue when it comes to the transfer of data to a processor established in a third country, for which the *'adequacy decision'* has been issued, but who is not subject to the GDPR under Art. 3.2.

On the one hand, Art. 45.1 GDPR clearly provides that *"... Such a transfer shall not require any specific authorisation."* hence there is formally no need for any *'appropriate safeguards'* prescribed in Art. 46 GDPR (including standard contractual clauses offered by the Implementing Decision (EU) 2021/914). On another though, Art. 28.3 GDPR unconditionally requires a *"contract or other legal act under Union or Member State law"* to be concluded with ANY processor. Can the set of standard contractual clauses offered by the Commission in its Implementation Decision (EU) 2021/915 fulfil that requirement?

2. Conversely, the applicability of Art. 3.2 GDPR (or, more generally, the recipient being subject to the GDPR) was explicitly used as the determining factor for the application of standard contractual clauses.

Recital (7) of the Commission Implementing Decision (EU) 2021/914:

"... The standard contractual clauses may be used for such transfers only to the extent that the processing by the importer does not fall within the scope of Regulation (EU) 2016/679. ..."

Art. 1.1 of the Commission Implementing Decision (EU) 2021/914:

"The standard contractual clauses set out in the Annex are considered to provide appropriate safeguards within the meaning of Article 46(1) and (2)(c) of Regulation (EU) 2016/679 for the transfer by a controller or processor of personal data processed subject to that Regulation (data exporter) to a controller or (sub-)processor whose processing of the data is not subject to that Regulation (data importer)."

The criteria of the processing by non-EU controllers and processors to be *'falling within the scope'* of the GDPR were clearly set out in the regulation and widely commented and explained within the EDPB Guidelines 3/2018. I so far have not come across any practical guideline on how such compliance can be effectively scrutinised and/or demonstrated by a (potential) data recipient established outside the Union. It transpires there is no formal mechanism in place that data exporter may rely on when verifying the GDPR compliance status of an intended data importer in a third country.

Any clarification / guidelines in this matter would also be greatly appreciated. Perhaps a graphical summary of the requirements and/or recommendations considering the exporter's and the importer's locations, 'adequacy' status and GDPR applicability would provide a clearer, unambiguous picture.

Kind regards,
Krzysztof Dyba