

Comments on the draft Guidelines 05/2021 of the European Data Protection Board

This paper exclusively reflects the views of its author.

On 19 November 2021, the European Data Protection Board published its draft Guidelines 05/2021¹ *“on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR”* (hereinafter referred to as Draft Guidelines or Draft).

Although the Draft is a noteworthy attempt to clarify this issue (that could have been done by the GDPR itself, by the way), many questions remain unanswered.

1. The definition of transfer: “otherwise making personal data available”

The Draft identifies one of the criteria for “transfer”: the controller or processor (“exporter”) *“discloses by transmission or otherwise makes personal data, subject to this processing, available”* to another controller, joint controller or processor (“importer”).²

The Draft determined the criteria of transfer by *“having regard to relevant findings in the CJEU Judgment of 6 November 2003, Bodil Lindqvist, C-101/01”* (the Lindqvist-case).³ Point 70 of the Lindqvist judgement makes it, however, clear that *“it must be concluded that Article 25 of Directive 95/46 [i.e. transfer of personal data to third countries] is to be interpreted as meaning that operations such as those carried out by Mrs Lindqvist [i.e. publishing data on her internet site] do not as such constitute a ‘transfer [of data] to a third country’ (emphasis added – Zs.B.). It is thus unnecessary to investigate whether an individual from a third country has accessed the internet page concerned or whether the server of that hosting service is physically in a third country.”*

In the light of the Lindqvist case, the Draft should determine whether “transfer” necessarily requires that the data leave the territory of the EU/EEA or not. If the expression *“otherwise makes personal data ... available”* does not mean that data physically leave the territory of the EU/EEA, but are available via the internet site of the controller/processor, then the Draft contradicts the Lindqvist judgement. In the light of the Lindqvist judgement, the situation where a processor having established outside the territory of the EU/EEA processes data via remote access to the controller’s site cannot be considered as transfer to a third country.

2. Importers: “third parties”

The same point of the Draft determines the scope of importers as *“another controller, joint controller or processor”*. Seemingly it is a closed list in the Draft, and it does not include “third

¹ See at the following link https://edpb.europa.eu/system/files/2021-11/edpb_guidelinesinterplaychapterv_article3_adopted_en.pdf

² Paragraph 7.2) of the Draft

³ See footnote 7 of the Draft.

party” (as per Article 4(10) GDPR). The obvious question is “Why not?”. What is the reason for not considering a transfer of data to a “third party” in a third country as transfer to third country?

3. Joint controllers

The Draft does not clarify clearly the status of joint controllers, i.e. the case where one of the joint controllers is established outside the EU and the data are moved to this party from the another joint controller (in the EU). From the EDPB Guidelines 07/2020 on the concepts of controller and processor in the GDPR⁴, one can conclude that the joint controllers are considered as one entity if viewed from the outside. Therefore, the said situation should not be considered as transfer (similarly to example 5) even if the data physically leave the territory of the EU.

4. Controller in third country—processor in EU: why?

The case described in example 3 is similarly controversial, i.e. when a processor in the EU sends data related to data subject(s) that are not EU residents back to the controller in a third country. Without using a processor in the EU, the given data processing would be covered by the law applicable to the controller’s law (incl. constitutional provisions and legislation), and data subjects may expect that their data is covered by these rules and that foreign laws and authorities (inc. EU law and authorities) do not interfere with this. Only the letter of the text of the GDPR [i.e. Article 3(1)] justifies in example 3 that the GDPR is applicable, but it is difficult to justify the logic behind that.

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In sum, the Draft Guidelines, although they provide guidance in some cases but leave some (if not many) questions unanswered. I tend to believe that without choosing a clear standpoint, i.e. without exclusively choosing either the “jurisdictional approach” or the “territorial approach”, no clear and consistent solution could be achieved.

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⁴ https://edpb.europa.eu/system/files/2021-07/eppb_guidelines_202007_controllerprocessor_final_en.pdf