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EBF response to the European Data Protection Board's consultation on the draft 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

Key points:

- The European Banking Federation (EBF) welcomes the opportunity to provide a response to the European Data Protection Board's (EDPB) consultation on the interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR.
- We are concerned by **the lack of alignment with the European Commission's final Standard Contractual Clauses (SCCs) for international data transfers**. Indeed, the SCCs note that where the GDPR applies to a processing activity, there is no need to resort to the mechanisms of Chapter V, including in situations covered by Article 3(2). The draft Guidelines indicate that **even if a specific data processing activity falls under Article 3(2) GDPR, there is still a need to assess whether supplementary measures are required for such processing activity**. However, when a processing activity already falls under Art. 3(2) GDPR, **this should give sufficient certainty on the level of protection of the data concerned.**
- The above interpretation of the draft Guidelines risks creating further uncertainty with regards to international data transfers and **undermines the risk-based approach of the GDPR.**

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1. Introduction

We welcome the intention of the EDPB to clarify aspects regarding the interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR, **particularly in light of the developments in the area following the CJEU ruling in the so called "Schrems II" case**. However, we are concerned about some inconsistencies with the final European Commission Standard Contractual Clauses (SCCs) for international data transfers[1] and the draft Guidelines, **notably with regards to Paragraphs 3 and 23**, which risk to create additional uncertainties with regards to data transfers, instead of helping to resolve them.

2. Alignment with the Standard Contractual Clauses (SCCs) for international data transfers

Recital 7 of the SCCs for international data transfers reads as follows:

"A controller or processor may use the standard contractual clauses set out in the Annex to this Decision to provide appropriate safeguards within the meaning of Article 46(1) of Regulation (EU) 2016/679 for the transfer of personal data to a processor or controller established in a third country, without prejudice to the interpretation of the notion of international transfer in Regulation (EU) 2016/679. ***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.*** *This also includes the transfer of personal data by a controller or processor not established in the Union, to the extent that the processing is subject to Regulation (EU) 2016/679 (pursuant to Article 3(2) thereof), because it relates to the offering of goods or services to data subjects in the Union or the monitoring of their behaviour as far as it takes place within the Union."*

In the text highlighted in bold, the European Commission seems to be saying that **when a data processing is carried out by a party in a third country and the data processing in question is already covered by the GDPR, that Standard Contractual Clauses (SCCs) should not be used.** It would seem that the European Commission is of the opinion that the GDPR already applies and that in these situations there is no need to resort to the mechanisms of Chapter V to ensure the level of protection the GDPR envisaged regarding the transfers. This is in line with the risk-based approach of the GDPR.

[1] Commission Implementing Decision (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council.

On the contrary, paragraph 3 of the draft Guidelines states the following:

"*… When relying on one of the transfer tools listed in Article 46 GDPR, it must be assessed whether supplementary measures need to be implemented in order to bring the level of protection of the transferred data up to the EU standard of essential equivalence.* ***This applies also in situations where the processing falls under Article 3(2) of the GDPR, in order to avoid that the protection provided by the GDPR is undermined by other legislation that the importer falls under.*** *This may for example be the case where the third country has rules on government access to personal data that go beyond what is necessary and proportionate in a democratic society (to safeguard one of the important objectives as also recognised in Union or Member States' law, such as those listed in Article 23(1) GDPR). The provisions in Chapter V are there to compensate for this risk and to complement the territorial scope of the GDPR as defined by Article 3 when personal data is transferred to countries outside the EU."*

The text in bold and the supporting argumentation **takes an opposite approach to the SCCs** – noting that even if a specific data processing is already covered by the GDPR, **SCCs or any of the other safeguards in Article 46 GDPR would still be needed**. **This interpretation seems to undermine the risk-based approach of the GDPR and seems to go against the intentions of the Regulation and the SCCs.** In a sense, it leaves the data exporter presupposing that the data importer (even if already subject to the GDPR for a specific data processing) would not be able to maintain that standard of equivalence. **That interpretation opens the door to further uncertainty in the field of international data transfers, where stakeholders, particularly data exporters**, are still coming to terms with the final SCCs and the EDPB's own Recommendation on Supplementary Measures.

We have the **same concern with Paragraph 23 of the draft Guidelines**, where it is envisaged that in the case of transfer of personal data to an importer in a third country, fewer safeguards and guarantees are required, if this importer is already subject to the GDPR pursuant to Art. 3 (2) GDPR. According to the Guidance, when the instruments governing the transfer, i.e. SCCs or ad-hoc contractual clauses, are developed**,** the applicability of Article 3 (2) should be considered, **in order to examine, rather, the elements and principles that are "missing" and, therefore, necessary to fill the gaps relating to the national laws of the third country in contrast with the GDPR or those that provide for access to the data to be part of the authorities of the third country itself.**

Such tools, the EDPB still states, should, for example, provide for the measures to be taken in the event of a conflict of laws between the legislation of the third country and the GDPR and in the event of legally binding requests for disclosure of data by third countries. In this regard, **the EDPB puts forward the idea that the development of an ad hoc tool that regulates the transfer (such as a new set of standard contractual clauses)** would be necessary for cases in which the importer is subject to the GDPR pursuant to Article 3 (2).

We believe that **this verification activity**, on the applicability or otherwise of the GDPR by **the importer of the third country to which the data will be transferred when a processing activity is caught under Article 3(2) GDPR, may prove difficult to carry out by the exporter in the EU.** The latter may have many difficulties in finding the necessary information to carry out the analysis pursuant to Art. 3(2). This concern mirrors the one resulting from the EDPB's Recommendations for Supplementary Measures and the extensive assessment of the relevant legislation in the third country that could impact maintaining an equivalent level of protection as the GDPR which data exporters must undertake.

In addition, the suggestion of developing additional SCCs during the period when there is an ongoing adjustment to the new SCCs for international data transfers by all actors, particularly data exporters, **raises many questions and could lead to fragmentation. When a processing activity already falls under Article 3(2) GDPR, this should give sufficient certainty on the level of protection of the data concerned.**

3. Additional clarifications

- Example 1 provides that, while no transfer occurs in the specific case presented, *"the Singaporean company will need to check whether its processing operations are subject to the GDPR pursuant to Article 3(2)."* This raises the following question: assuming that this Singaporean company in this example is subject to the GDPR for its processing operations and it goes on to use a processor based either in Singapore or in another third country to process the Italian customer's data, is the Singaporean controller making a "transfer" to its processor? From the criteria, this would appear to be the case. We would therefore recommend for the **guidelines to clarify and explicitly state that a transfer can occur between an exporter and importer who are both located in third countries (including in the same third country), in circumstances where the exporter is subject to the GDPR by virtue of Art 3(2).**
- We note that an international transfer of data would be applicable in situations where a European company as a data processor returns personal data to a data controller outside of the EEE/EU that is not subject to GDPR. This is already clearly stated in Example 3 of the draft Guidelines.
- Paragraph 14 of the draft Guidelines provides that the concept *of "transfer of personal data to a third country or to an international organisation" only applies to disclosures of personal data where two different (separate) parties (each of them a controller, joint controller or processor) are involved*." Therefore, the disclosure of data from a controller or a processor (the exporter) ***to a different*** controller or processor who receives the data or accesses to them (the importer) is qualified as a transfer. Paragraph 15 goes on to say that "*if the sender and the*

*recipient **are not different controllers/processors,** the disclosure of personal data **should not be regarded as a transfer** under Chapter V of the GDPR.'*

Given the above, would a transfer of data, carried out by a European data exporter towards their branches based in third countries, qualify as a disclosure carried out within the same data controller (i.e., the legal entity based in Europe to which they belong)? We note that the branches are not considered as legal persons, even if they are subject to the legal framework applied in the third countries. We would welcome a clarification on this point in the Guidance.

- In Example 5, we would recommend adding to the title "*Employee of a controller **or processor** in the EU travels to a third country on a business trip*", and to make the corresponding change throughout the example. Including this specification would help users of the Guidelines, taking into consideration cases such as an employee for a processor traveling to a third country on a business trip.

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About the EBF

The European Banking Federation is the voice of the European banking sector, bringing together 32 national banking associations in Europe that together represent a significant majority of all banking assets in Europe, with 3,500 banks - large and small, wholesale and retail, local and international – while employing approximately two million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that reliably handle more than 400 million payment transactions per day. Launched in 1960, the EBF is committed to a single market for financial services in the European Union and to supporting policies that foster economic growth.

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