31.01.2022

To the European Data Protection Board
Brussels

Dear Sirs,

Re: Feedback of the Cyprus Branch of the European Association of Data Protection Professionals (EADPP) to the EDPB 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

The Cyprus Branch of the EDPB welcomes the opportunity to provides its feedback pursuant to the above published initiative.

For any information or clarification, please contact Ms. Maria Raphael at the email address maria@privacyminders.com

INTRODUCTION		
1.	Paragraph 2	It is stated that ‘’when personal data is transferred and made accessible to entities outside the EU territory, the overarching legal framework provided within the Union no longer applies’’. This is the reason put forward by EDPB to explain the need for ensuring that appropriate safeguards are taken in accordance with Chapter V of the GDPR (refer to paragraph 3). We contend that the statement above only and partly reflects the situation where the personal data are transferred to importers not subject to the GDPR in respect of the given processing. In this situation, the GDPR is still applied on the exporter subject to the GDPR for the processing, however it is not applied to the importer not subject to the GDPR for the processing. It, however, doesn’t reflect the situation, where the importer is in a third country or is an international organisation and must comply with the GDPR provisions, where the processing of personal data falls under Article 3(2) of the GDPR. In this case, GDPR’ applicability on the importer for the applicable processing remains regardless of whether personal data are transferred and made accessible to the importer.

		It is not the applicability of the GDPR that is affected where personal data are transferred to importers in third countries or international organisations, but rather the enforceability of the GDPR rules against them such as where no representative is appointed in the Union as per art. 27 of the GDPR or there are impediments on the enforcement of the GDPR against the third country controller or processor. Additionally, the legislation and practice of third countries may undermine the level of protection afforded by the overarching legal framework provided within the Union. Therefore, we recommend that the phrase ‘’when personal data is transferred and made accessible to entities outside the EU territory, the overarching legal framework provided within the Union no longer applies’’ is replaced with: ‘’when personal data is transferred and made accessible to entities outside the EU territory, the level of protection of individuals’ rights and freedoms may not be essentially equivalent to the one afforded by the overarching legal framework provided within the Union’’.
2.	Paragraphs 5, 15 and 17	The EDPB highlights that there may be risks for certain data flows that may not constitute a transfer under Chapter V which must still be addressed by complying with the relevant GDPR provisions, such as art. 32 of the GDPR. This is reiterated in paragraph 17, where as an example reference is made to risks due to conflicting national laws or government access in a third country as well as difficulties to enforce and obtain redress against entities outside the EU. In the EDPB Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data (Version 2.0), the exporter must assess if there is anything in the law and/or practices in force of the third country **that may impinge on the effectiveness of the appropriate safeguards of the transfer tools** that the exporter is relying on, in the context of the specific transfer. This is based on the Schrems II decision, where the CJEU concluded that it must be ensured that data subjects whose

		personal data are transferred to a third country pursuant to standard data protection clauses are afforded a level of protection essentially equivalent to that guaranteed with the European Union by that regulation. **However, where a transfer tool is not used, for transfers outside the scope of Chapter V, there are no safeguards of a transfer tool, which may be jeopardized by the law or the practice in the third country**. **There are no safeguards which the practices and law in the third country can be assessed against**. Therefore, we would welcome a clarification by the EDPB in relation to the standard of protection of personal data against which the practices and law in the third country will be assessed in case Chapter V is not applicable and a transfer tool is not used. The bar is high for transfers of personal data to third countries governed by Chapter V of the GDPR. It would be appropriate for the bar to be lower when the transfers are not governed by Chapter V of the GDPR. Nevertheless, where GDPR is applied on a third-country controller, pursuant to article 3(2) of the GDPR, this is applied regardless of the standard of the legal framework or practices of the third country where the processing takes place and the possibility of enforcement of the GDPR obligations. In the absence of SCCs or clauses which have the similar effect as the SCCs, for transfers outside the scope of Chapter V, it may be more difficult for the exporter to take measures to ensure that the personal data are offered in the third country a level of protection equivalent to that guaranteed within the EU. Would the EDPB recommend the use of clauses similar to the SCCs approved by the European Commission for transfers outside of the Chapter V scope, as part of the exporter meeting its obligations to take the appropriate technical and organizational measures to protect the personal data transferred?
3.	Paragraph 13, example 3	Module 4 of the EU-commission approved Standard Contractual Clauses for processor to controller transfers, specifically state that they are applicable **‘’where the EU processor combines the personal data received from the third country-controller with personal data collected by the processor in the EU’’.**

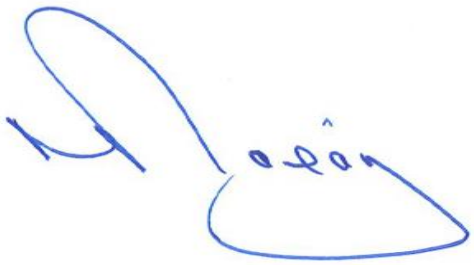
		In case the EDPB considers that a restricted transfer exists also in cases where the EU processor sends back the personal data collected received by the third country-itself, it should have encouraged the development of a new set of SCCs covering this situation, as it has similarly encouraged the development of SCCs for transfers to third-country entities subject to the GDPR. Otherwise, if the EDPB is of the opinion that there is a restricted transfer only where the EU processor combined the personal data received from the third country-controller with personal data collected by the processor in the EU (or sends to the third country-controller personal data collected by the EU processor without combining it with personal data received by the controller), it should explicitly clarify this. We contend that there is no transfer of personal data from an EU processor to its third country-controller where the EU processor simply sends back to the third country controller the personal data that it had received from that third country-controller, but only where the EU processor combines the personal data received from the third-country controller with personal data collected by the processor in the EU or sends to the controller personal data received by the processor itself. The Chapter V provisions **aim to ensure that the level of protection of natural persons guaranteed by the GDPR is not undermined (last sentence of art. 44 of the GDPR, Recital 101).** The intention of the legislator was for the Chapter V provision to only apply in situations where article 3 of the GDPR grants GDPR protection to the personal data. The personal data of data subjects who are not in the Union processed by a third country controller (where art. 3(2) of the GDPR is not applied) are not guaranteed any protection by the GDPR. The processing undertaken by the EU-based processor on behalf of that controller, even in relation to personal data of data subjects not located in the EU, should abide by the GDPR provisions pursuant to the establishment criterion of art. 3(1) of the GDPR to the extent that these obligations are not affected by the fact that the controller is based in a third country. The Chapter V provisions are only applicable to the processor, in this situation, in relation to transfers to third

		countries in the context of its activities and in relation to transfers of personal data processed on the third country controller's behalf from the EU processor to its own over-seas processors or in relation to transfers to controller(s) of personal data which were collected by the EU processor or of personal data received by the third country controller in combination of personal data collected by the EU processor. The reason is that where the processing is undertaken by the processor on behalf of the controller in this example, the processing is not undertaken in the context of art. 3(2) of the GDPR which would have triggered the applicability of the GDPR on the controller and the protection of personal data guaranteed by the GDPR in the hands of that controller prior to the transfer of these data to the EU processor. Therefore, the return of this personal data by the EU processor to the third country controller, should not grant GDPR obligations to the third country controller in order to afford to this personal data protection at the level guarantee by the GDPR which would have otherwise not been afforded to the personal data. Similarly, EDPB Guidelines 03/2018 on the territorial scope of the GDPR (Article 3), version 2.1. do not opine for the applicability of all GDPR provisions upon the processor when the controller is third party in relation to the processing undertaken on the behalf of that controller. In p.12 of these Guidelines, for example, the EDPB opines that the obligations imposed on processors under Article 28(2), (3), (4), (5) and (6) apply, with the exception of those relating to the assistance to the data controller in complying to the controllers' own obligations under the GDPR (i.e. art. 28 (3) e, f and h of the GDPR). Additional Note: reference to ''non-EU residents'' to be replaced with ''reference to ''data subjects not located in the EU'' (art. 3(2) of the GDPR).
4.	Paragraph 23	Whereas the EDPB encourages and stands ready to cooperate in the development of a transfer tool, such as a new set of standard contractual clause, in cases where the importer is subject to the GDPR for the given processing in accordance with Article 3(2), it is not, however, clarified whether the existing SCCs can still be used for transfers to non-whitelisted third countries when the importer is subject to the GDPR for the given processing.

		It is indeed the case that Recital 7 of the Implementing Decision (2021) 3972 of 4 June 2021 specifies in which cases the SCCs ‘’may’’ be used. It is stated that ‘’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 the GDPR’’**. One may argue that the implementing decision defines restrictively the scope of the SCCs and does not allow the use of the SCCs where the processing by the importer falls within the scope of the GDPR. This is further amplified by Recital 9 which provides that where the processing involves data transfers from controllers subject to the Regulation **to processors outside its territorial scope** or from processors subject to the Regulation **to sub-processors outside its territorial scope**, the standard contractual clauses set out in the Annex to this Decision should also allow to fulfill the requirements of Article 28(3) and (4) of the Regulation. However, it can be counter-argued that Recital 7 is not of binding nature. There is no provision in the Implementing Decision which denies the appropriateness of using the SCCs for transfers to third-country importers for processing subject to the GDPR, but only provisions that emphasize their appropriateness for transfers to importers whose processing is not subject to the GDPR. Article 1 of the Implementing Decision applies which states that ‘’the standard contractual clauses set out in the Annex **are considered to provide appropriate safeguards within the meaning** of Article 46(1) and 2© 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).** If the standard contractual clauses are considered by the European Commission to be an appropriate safeguard for an importer who is not subject to the GDPR for the given processing, **they must a maiore ad minus provide suitable protection for an importer who must alco comply with the GDPR**. The repetition, in the standard contractual clauses, of GDPR obligations which sine qua non commit the subject to GDPR importer does not render the SCCs inappropriate.

		Therefore, until new standard contractual clauses are in place addressing specifically transfers to importers for processing subject to the GDPR, we kindly invite the EDPB to clarify that the SCCs approved by the EU Commission can be used for transfers to third-country importers for processing subject to the GDPR.

Yours Sincerely,



Maria Raphael
Chair of the Board of the EADPP Cyprus Branch
On behalf of the Board of the EADPP Cyprus Branch