

Comment

of the German Insurance Association (GDV)

ID-number 6437280268-55

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

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1. Introduction

The German Insurance Association (GDV) welcomes the EDPB draft guidelines 5/2021. They provide legal certainty for significant questions that to date have remained a point of contention. With regard to the following points, however, we ask the EDPB to rethink its stance and/or provide additional guidance respectively:

2. Example 3 is not a transfer pursuant to Chapter V of the GDPR

In example 3, the draft guidelines describe the case in which a controller without an EU establishment sends personal data of non-EU residents to a processor in the EU. After processing the data on behalf of the controller, the processor in the EU transmits the data back. According to the EDPB that re-transmission constitutes a transfer to a third country pursuant to Chapter V of the GDPR. We would ask the EDPB to reconsider their assessment as it would unduly extend the GDPR's territorial scope of application. The non-EU-controller is not subject to the GDPR in accordance with its Art. 3, but would be required to rely on a safeguard in Art. 46 GDPR or a derogation in Art. 49 GDPR. The resulting situation appears dissonant and contradicts the EDPB guidelines 3/2018 (page 13) insofar as they declare that "[no] additional obligations [are imposed] on controllers outside the Union in respect of processing not falling under the territorial scope of the GDPR".

Furthermore, as the EDPB correctly states in para. 7 and 11 ff., in order to qualify as a transfer to a third country, the processing in question must involve personal data being **disclosed by transmission or otherwise made available** to a data importer. However, in cases like example 3 the personal data is not disclosed to the controllers in the third country since it originates from them and is already available to them. We believe that the qualification as a data transfer to a third country should not only depend on the parties involved in the processing, but should also **factor in the data concerned**.

The purpose of its Artt. 44 ff. is to ensure that level of data protection guaranteed by the GDPR is not undermined by transferring personal data protected under the GDPR to a third country for (further) processing. That purpose cannot apply to these cases because the personal data was not protected by under GDPR in the first place.

In its current state example 3 of the draft guidelines 5/2021 would in practice require EU-processors to conclude module 4 of the standard contrac-

tual clauses for data transfers to third countries (SCCs) when re-transmitting the data to the non-EU-controller. Meanwhile a non-EU-processor would not be required to do this. Since in this constellation the SCCs would grant non-EU-residents third-party beneficiary rights they would otherwise not have, the draft guidelines create a massive competitive disadvantage for EU-processors.

3. Need for additional clarifications

For the sake of completion, we propose that the EDPB provides additional clarification for the frequently occurring situations wherein personal data subject to the GDPR is processed by a third-country processor or its EU-subsidiary on behalf of a EU-controller **with the data physically remaining in the EU**. With respect to the increasing use of cloud services, these situations grow in relevance, while the necessity of transfer tools pursuant to Chapter V of the GDPR often remains a controversial point of discussion between the parties involved. Further guidance from the EDPB would create legal certainty.