



# Comments on EDPB Guidelines 05/21 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR

January 28, 2022

Workday is pleased to provide comments on the European Data Protection Board (EDPB) Guidelines 05/21 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR (the Guidelines).

Workday is a leading provider of enterprise cloud applications for finance and human resources, helping customers adapt and thrive in a changing world. Workday applications for financial management, human resources, planning, spend management, and analytics have been adopted by thousands of organisations around the world and across industries—from medium-sized businesses to more than 50% of the *Fortune* 500. Headquartered in Pleasanton, California, Workday has more than 14,000 employees worldwide and over 3,000 employees in our 19 offices across Europe.

As a provider of cloud-based software-as-a-service applications, we recognize the incredible trust our customers place in us to safeguard their data, and we maintain the highest standards of privacy and data protection. Workday therefore welcomes the Guidelines' clarification of the meaning of "transfer" to ensure the GDPR provides a high level of protection for personal data worldwide.

If you have any questions or would like further information, please do not hesitate to contact Jens-Henrik Jeppesen, Director, EMEA Public Policy, at [jens.jeppesen@workday.com](mailto:jens.jeppesen@workday.com).

## I. General feedback

Workday welcomes the intention of the Guidelines to clarify the relationship between GDPR Article 3 and the GDPR provisions on international transfers in Chapter V. We offer two suggestions to further improve the Guidelines.

First, Workday appreciates the Guidelines' recognition that the European Commission's standard contractual clauses (SCCs) Implementing Decision of 4 June 2021 caused confusion regarding whether those enhanced SCCs are relevant for data importers directly subject to GDPR Art. 3(2). However, the development of "a transfer tool, such as a new set of standard contractual clauses, in cases where the importer is subject to the GDPR for the given processing in accordance with Article 3(2)," as the Guidelines suggest, could ultimately be duplicative. In general, if parties are already implementing the 2021 SCCs, additionally implementing a new set of clauses risks unnecessarily replicating GDPR

requirements for organizations already in compliance. If new SCCs are developed, they should be focused on addressing “the elements and principles that are ‘missing’ and, thus, needed to fill the gaps relating to conflicting national laws and government access in the third country as well as the difficulty to enforce and obtain redress against an entity outside of the EU,” as noted in the Guidelines.

Second, the Guidelines should provide an example or further specificity on onward transfers. In particular, it would be helpful to confirm that the SCCs’ flow down obligations apply to an importer that onward transfers personal data. In this case the obligation arises under the SCCs not because the importer (and then onward exporter) is directly subject to GDPR. Therefore, though the Guidelines’ first criterion is not met, the onward transfer is still partially in-scope of the Guidelines. Given the increasing prevalence of onward transfers in digital supply chains, addressing these situations would improve the overall clarity brought by the Guidelines.

## II. Recommendations and clarifications

Beyond the suggested clarifications above, Workday is pleased to offer recommendations and clarifications on the Guidelines.

First, the Guidelines state on page 4 that “It is however important to keep in mind that although a certain data flow may not constitute a transfer under Chapter V, such processing can still be associated with risks for which safeguards must be envisaged.” Because this provision explicitly recognizes that such data flows are *not* Chapter V transfers, **the EDPB should clarify why this reference to such non-transfer processing is relevant or not outside of the scope of the Guidelines.**

Second, with respect to Example 5 (“Employee of a controller in the EU travels to a third country on a business trip”), **the Guidelines should confirm that this analysis extends to independent contractors, who act as a similarly “integral part of the controller.”** Independent contractors or similar entities are increasingly prevalent across sectors, often acting in roles with similar responsibilities to full time employees. Yet despite their potential status as corporate entities for tax and employment purposes, they maintain the qualities of the employee in Example 5 in that they can act as an “integral” part of their employer, and also cannot functionally fulfill the duties of a controller or processor such as signing SCCs or becoming party to Binding Corporate Rules (BCRs).

Third, with respect to the second criterion of a transfer, the Guidelines state that “This 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’).” **The Guidelines would benefit from further examples or specificity regarding the nature of the “transmission” and “otherwise makes available” as used in the second criterion.** Further detail on when a processing is a “transmission” or “otherwise makes personal data available” would improve the ability of organizations to comply with the GDPR, particularly for large processors that undertake multiple kinds of processing with varying attributes.

Further, it is generally understood that a transfer includes access to an EU database or system by a third party outside of the EU or an adequate jurisdiction. The Guidelines should clarify whether this conclusion would hold, for example, with the viewing of an internet or intranet page. The EDPB's Recommendations on supplementary measures (01/2020) contain specific footnotes on this question that are not replicated in the Guidelines' proposed definition of a transfer yet, given their relevance to defining the criteria that qualify a transfer, **should be re-documented in the Guidelines for certainty**. For example, the Recommendations include footnotes:

“23. Please note that remote access by an entity from a third country to data located in the EEA is also considered a transfer.”

28. “[...] it should be borne in mind that even providing access to data from a third country, for instance for administration purposes, also amounts to a transfer.”<sup>1</sup>

The opportunity to consolidate the transfer definition with examples in a single guidance document should not be missed.

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<sup>1</sup> EDPB Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data, 18 June 2021, p. 10-11.