

Response to public consultation on

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

focusing on information obligations

Prof. Dr. Gloria González Fuster¹

1. The draft Guidelines 05/2021 put forward a notion of ‘data transfer’ relevant to interpret Chapter V of the GDPR and its interplay with Art. 3 GDPR. This is very welcome. The Guidelines, however, leave open the question of the **interplay between such notion of ‘data transfer’ and other references to transfers of personal data in the GDPR**. This concerns most notably the interplay of such notion with **information obligations related to transfers** in Art. 13(1)(f) and 14(1)(f) GDPR.²
2. The proposed interpretation of ‘data transfer’, regardless of its pros and cons, does not necessarily match the most common understandings of what it means to ‘transfer’ something out of somewhere, to somewhere else: in this sense, there will be numerous instances in which personal data could be perceived by data subjects as somehow ‘moving out’ or ‘being moved’ from the EU/EEA to another place that **will, however, not constitute a ‘data transfer’ in light of Guidelines 05/2021**. That could be the case, for instance if the controller/processor has to comply with the GDPR due to Art. 3(2) GDPR. In those situations, the data subject could consider that data have been transmitted somewhere crossing a relevant (physical, political, legal) border that appears relevant to them, but there shall **not be what the Guidelines call a ‘data transfer’**.
3. In this context, it is crucial that data controllers are urgently provided by the EDPB with updated, **clear and unambiguous guidance regarding what are they supposed to communicate exactly to data subjects in relation to cross-border data movements**.
4. In the absence of such new guidance, data controllers are now left with, as main reference, a vague message of Article 29 Working Party in their *Guidelines on transparency under Regulation 2016/679*,³ dating from 2017, according to which:

‘In accordance with the principle of fairness, the information provided on transfers to third countries should be as meaningful as possible to data subjects; this will generally mean that the third countries be named.’⁴

¹ Research Professor on Digitalisation & a Europe of Rights and Freedoms at the Vrije Universiteit Brussel (VUB)’s Faculty of Law and Criminology. Co-Director of the Law, Science, Technology and Society (LSTS) Research Group. Email: gloria.gonzalez.fuster@vub.be.

² The discussion below is also relevant in relation to information about transfers to be provided in the context of the right of access (Art. 15(2) GDPR).

³ WP260 rev.01.

⁴ Annex accompanying WP260 rev.01, p. 38.

5. The key question is thus: **What does it mean in 2022 to provide ‘meaningful information’ about data transfers to data subjects**, knowing that we now know (as put forward by Guidelines 05/2021) that there might be cross-border movements of data which are not to be regarded as ‘data transfers’ for the purposes of Chapter V? Should such other movements just be ignored in the context of information obligations? Or shall they be mentioned? Shall they be mentioned sometimes? If so, when? And how to make sure the data subject is in a position to understand what is actually happening?
6. To answer this question, the EDPB must clarify the interplay between the notion of ‘data transfer’ as in Chapter V and Arts. 13(1)(f) and 14(1)(f) GDPR, and in particular explain whether it is correct **to interpret that Art. 13(1)(f) and 14(1)(f) GDPR only apply to ‘data transfers’ falling under Chapter V GDPR as interpreted by Guidelines 05/2021**.
7. That is not the only possible reading of such provisions. In line with Art. 13(1)(f) GDPR,⁵ the controller shall inform the data subject, ‘*where applicable*’, about the fact that it ‘*intends to transfer personal data to a third country or international organisation*’. This obligation is accompanied by an obligation to inform about the ‘*existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the means by which to obtain a copy of them or where they have been made available*’. This second part of Art. 13(1)(f) GDPR is certainly manifestly connected to Chapter V GDPR. This does not necessarily mean, however, that the first part also applies only strictly to ‘data transfers’ covered by Chapter V GDPR as interpreted by Guidelines 05/2021. In this regard, Art. 13(1)(f) GDPR does not state that controllers must only inform about ‘data transfers regulated by Chapter V’. As a matter of fact, the provision does not use in its English version the term ‘data transfer’, but rather the construction ‘*to transfer personal data*’,⁶ which might (or not) be broader.
8. If the view of the EDPB is that Arts. 13(1)(f) and 14(1)(f) GDPR only apply to ‘data transfers’ falling under Chapter V GDPR as interpreted by Guidelines 05/2021, **guidance must be provided to data controllers about how to respect the principles of fairness and transparency** regarding all other cross-border data movements that might nevertheless occur.
9. Such guidance must take into account, first, that **the ultimate objective must be that data subjects are able to understand whether the processing of data about them will fall directly under the GDPR or is to be covered by Chapter V mechanisms**, so they know how to exercise their data subject rights and access remedies.
10. Second, and in addition, there could be a legitimate expectation in data subjects to be informed, at least in some cases, about the fact the data about them have crossed certain borders, **regardless of the fact that such crossing might not be a ‘data transfer’**

⁵ The text of Art. 14(1)(f) GDPR is the same.

⁶ Similar choices appear in other versions; cf. the German version (‘*die personenbezogenen Daten an ein Drittland oder eine internationale Organisation zu übermitteln*’ vs. ‘*Übermittlungen personenbezogener Daten*’, the Spanish version (‘*transferir datos personales a un tercer país u organización internacional*’ vs. ‘*Transferencias de datos personales*’).

falling under Chapter V according to Guidelines 05/2021. The EDPB should clarify if this could be a possible way of interpreting the obligation to provide information about transfers which is ‘as meaningful as possible’ to data subjects, in line with Art. 29 WP guidance.

11. In this context, it must be recalled that **the GDPR does not oblige data controllers to inform data subjects about whether they have an establishment in the Union, or about whether they have to comply with the GDPR under Art. 3(1) or Art. 3(2).** Art. 13(1)(a) only obliges controllers to inform data subjects about ‘*the identity and the contact details of the controller and, where applicable, of the controller’s representative*’. Allegedly, if a representative is mentioned in a data protection notice this could be a strong indication that the controller lacks an establishment in the EU, and is therefore applying the GDPR due to Art. 3(2). However, a representative is not always compulsory when Art. 3(2) GDPR applies.⁷
12. There might be many cases, therefore, in which in the absence of additional information it will be very difficult, if not impossible, for data subjects to know or even imagine that their data are crossing some border. Such feeling of ignorance might even be reinforced by the fact that data subjects might have grown to expect that data protection notices now include a section on ‘data transfers’ whenever personal data about them is transferred to a third country or international organisation, without realising that this is only true in some cases.
13. In sum, as the draft Guidelines 05/2021 put forward an interpretation of ‘data transfer’ that is not necessarily fully intuitive and which could, if not properly framed, create more opaqueness than transparency insofar as data subjects are concerned, the EDPB must imperatively explain in the very same Guidelines which are exactly **the implications of such approach in relation to information obligations.** Concretely:
 - a. clarify if the obligations under Art. 13(1)(f) and Art. 14(1)(f) GDPR apply only to the ‘data transfers’ falling under Chapter V GDPR as described in Guidelines 05/2021;
 - b. explain if the principles of transparency and fairness, or any other GDPR principle or provision,⁸ impose on data controllers any **requirements regarding the transparency of cross-border data movements that do not qualify as ‘data transfers’**, and what would be such information requirements.

Prof. Dr. Gloria González Fuster
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⁷ See Art. 27(2) GDPR.

⁸ Possibly connected to higher risk, which is also relevant as § 5 of the Guidelines point out. Recital (39) GDPR refers to the need to the fact that, in relation the principle of transparency ‘*Natural persons should be made aware of risks, rules, safeguards and rights in relation to the processing of personal data*’.