Questions and comments to the EDPB 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 Dutch Confederation of Dutch Industries and employers (VNO-NCW/MKB-Nederland) welcomes the opportunity to provide input and ask questions regarding the EDPB guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfer as per chapter V of the GDPR. We appreciate the effort the EDPB put into drafting the Guidelines, illustrated with examples, with the aim to provide businesses – in the aftermath of the Schrems-II judgment - with guidance on the Interplay between the application of Article 3 and the provisions on international transfer as per chapter V of the GDPR.

Many companies and other organisations, big and small, take part in the global digital economy, an economy that does not recognize borders. As a result of (fast) technological developments and data flows the digital economy will be able to expand in the near future and, for instance, making it possible for SMEs to take their part in the digital economy which is an essential development for their resilience and sustainable development. New European legislation initiatives such as the Digital Services Act and the Data Governance Act have the ambition to empower such growth and strengthen the position of Europe in the global market. The Guidelines include criteria to qualify a processing as a transfer of personal data to a third country or to an international organisation. This qualification is essential for companies to assess whether and consequently which transfer tool they need to implement under the GDPR. We propose a realistic risk-based approach whereby Chapter V shall be applied to ensure that the level of protection of natural persons guaranteed by the GDPR is not undermined.

We appreciate clarification of certain aspects of the guidelines to give companies more assurance how to interpret the interplay between chapter V and article 3 of the GDPR.

Summary

1. *The current guidelines seem to focus mainly on third country parties who fall within the scope of Article 3.2. Clarity regarding the interplay between Article 3.1 and Chapter V would be much appreciated.*
2. *We are of the opinion that the provisions in Chapter V are there to ensure that the level of protection of natural persons guaranteed by the GDPR is not undermined when transferring data to an importer in a third country. As an importer ex article 3 is already subject to all provisions of the GDPR, such persons should, in our opinion, fall outside the scope of Chapter V.*
3. *Other questions arose regarding the guidelines for which clarification would be much appreciated: mere conduits; overarching legal framework; EU standard of essential equivalence; second sentence article 44; customized safeguards; Making available; example 4 – C as affiliate; example 4 and BCR-Ps; paragraph 14; example 5; two affiliates of a multinational enterprise; paragraph 17; and direct submission of data.*

We would like to take this opportunity to ask some specific questions and make some comments regarding the Guidelines 05/2021:

1. **Article 3.1 GDPR**
   Could the EDPB elaborate – and include example scenarios - regarding the transfer of personal data to a controller or processor in a third country who falls within the scope of Article 3.1, specifically if it has an establishment in the Union as highlighted in EDPB opinion

3/2018? Having an establishment in the Union does not necessarily mean that only one legal entity is involved (for example: a subsidiary).
The current guidelines seem to focus mainly on third country parties who fall within the scope of Article 3.2.

2. **(Not) undermining level of protection - I**
Under paragraph 12 of the Guidelines, we read that Chapter 5 does not apply to a direct transfer from a data subject to a recipient in a third country (including a controller or processor in a third country who falls within the scope of Article 3). The reason for this, if we understand correctly, is that a data subject cannot be an exporter (controller or processor) ex. Article 4.10 GDPR.
But according to the three transfer criteria of the Guidelines, if the same data subject transfers the same data to the same party in a third country (article 3) but now through a party in the Union, additional safeguards ex article 46 (Chapter 5) are needed? Are we correct to assume that the EDPB deems the level of protection of natural persons guaranteed by the GDPR to be undermined because a party in the EU is involved? We ask this with specific reference to Article 44 in which is stipulated that the provisions of Chapter V shall be applied to ensure that the level of protection of natural persons guaranteed by the GDPR *is not undermined*[1]. Therefore, it stands to reason that in a situation where the level of protection is deemed not to be undermined, no additional safeguards ex chapter V should be needed? Could the EDPB elaborate on this?

3. **(Not) undermining level of protection - II**
If a controller or processor is subject to the GDPR ex article 3.2, it is subjected to all provisions of the GDPR, including to article 23 GDPR (such as restrictions regarding national security). Just as a direct transfer from a data subject to a processor or controller in a third country, which is subject to the GDPR ex article 3.2, is not deemed to undermine the level of protection guaranteed to natural persons under the GDPR[2], an indirect transfer from a processor or controller in the Union to a controller or processor subject to the GDPR ex article 3.2 GDPR, should be deemed not to undermine the level of protection guaranteed to natural persons under the GDPR. The level of protection is not different only because a data subject cannot be an exporter. Whether a controller or processor ex. article 3.2 can or cannot adhere to the provisions of the GDPR (including article 23) due to laws of the country such party is also subject to, is not a problem which can be solved by companies. This is a problem of an international political nature. It is important that the EDPB acknowledges this. It is an enforcement problem due to the extra-territorial scope of the GDPR which needs to be solved on a political level and not by companies who have no control over the laws they are subject to.

If a DPA in the Union deems a specific controller or processor to process personal data in contradiction to one or more provisions of the GDPR it has the duty to enforce the GDPR. It is important that international agreements are in place to ensure that the DPAs can enforce the GDPR vis a vis companies which fall within the scope of article 3.2 GDPR.

We are of the opinion that the provisions in Chapter V are there to ensure that the level of protection of natural persons guaranteed by the GDPR is not undermined when transferring data to an importer in a third country. As an importer ex article 3 is already subject to all provisions of the GDPR, such persons fall outside the scope of Chapter V.

[1] See also paragraph 1.1 of the EDPB Guidelines itself.
[2] This follows from the GDPR (article 4.10 and Chapter 5)

In our opinion, a jurisdictional approach is to be preferred instead of a geographical approach. This also coincides with paragraph 17 and 24 of the Guidelines in which the EDPB points out that if a certain data flow does not qualify as a 'transfer' the controller is still accountable for its processing activities and must comply with the GDPR, including for instance the obligation to implement technical and organizational measures depending on the risks involved. As would a processor. Could the EDPB elaborate why she deems it nevertheless necessary to include the following sentence in criteria number 3: "*irrespective of whether or not this importer is subject to the GDPR in respect of the given processing in accordance with Article 3"*? It seems unreasonable and unfair to make companies in the Union responsible for the lack of ability of DPAs to enforce the GDPR (ex. article 3) in third countries.

4. **Transmission – mere conduit communication service provider**
Many companies do not own the technical equipment needed for the actual transmission of data to a third country but need to make use of the infrastructure provided by a communication service provider. That means that the data is first provided to the communication service provider in the same country as the exporter, which in turn forwards the data to a communication service provider in a neighboring country and so on, until the transmission to the actual importer is completed. If we apply the three transfer criteria of the EDPB guidelines to this example, the intermediate parties could be assumed to be engaged in (onward) transfer. It is important, however, to note that the communication service providers are providing 'mere conduit' intermediate services (see the Digital Service Act in this respect). Would the EDPB for example consider these "mere conduits" to not be part of (a cascade of) "disclosure by transmission" processing operations and to not be included in the notion of a "transfer"? If not, could the EDPB elaborate – and include example scenarios - what this means for the practical implementation of the conditions in Chapter V?

5. **Overarching legal framework**
Paragraph 1.2 of the Guidelines states that the provisions of Chapter V entail that not only the level of protection of natural persons guaranteed *by the GDPR* should be ensured but also by other rules - both on EU and Member State level - that must be in line with the GDPR (the overarching legal framework). Could the EDPB elaborate where in Article 44 GPDR this is explicitly required?

6. **EU standard of essential equivalence**
Under paragraph 3 of its Guidelines, the EDPB requires a level of protection which is 'the EU standard of essential equivalence'? Where in Article 44 GDPR is it stated that the level of protection should be essential equivalent?[3] Aren't we right to assume that article 46 (transfers subject to appropriate safeguards) requires appropriate safeguards for the processing activity and data sets at hand and does not require the country of the importer to offer an essential equivalent protection? This would concur with the wording in paragraph 21 of the Guidelines (adequate level of protection; appropriate safeguards). Could the EDPB elaborate on this?

7. **Second sentence article 44**
> *"The importer is in a third country of is an international organization, irrespective of whether or not this importer is subject to the GDPR in respect of the given processing in accordance with Article 3."*

If we take the respective footnotes of the Guidelines into account, it seems that the third criterium for a data transfer is based upon the first sentence of article 44 GDPR and on the CJEU Judgment Bodil Lindqvist[4]. Could the EDPB elaborate why it did not include the

[3] The EDPB refers to its own Recommendations (Recommendations 01/2020 and 02/2020)
[4] CJEU Judgment of 6 November 2003, C-101/1, EU:C:2003:596

second sentence of article 44 ("All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined")? This second sentence determines, in our view, the scope of the first sentence. Could the EDPB elaborate if and in so far, the Lindqvist decision endorses the current view of the EDPB on the interplay of 3 and Chapter 5?

8. **Customized safeguards**
In paragraph 23 is stated that the content of safeguards needs to be customized depending on the situation. Does the EDPB concur that duplication is not in itself problematic, and that customization of existing recently updated SCCs is not necessary per se? That a light version of the SCCs is a nice to have but not a must to have? Does the EDPB concur that it is of importance for companies, specifically SMEs, within the context of legal certainty and practical implementation of the complex obligations under the GDPR, that the guidance of the EDPB is aligned with the (recently updated) transfer tools of the EC?

9. **Making available**
In paragraph 11 of the Guidelines is stated: 'disclosing by transmission or otherwise making data available' Could the EDPB elaborate what is meant by 'or otherwise making data available'?

10. **Example 4 – C as affiliate**
Example 4 of the Guidelines is a situation that happens regularly in practice. Could the EDPB elaborate what applies in a situation where C is an affiliate of B?

11. **Example 4 and BCR-Ps**
Are we right to assume that B and C in example 4 can have a BCR-P (Binding Corporate Rules for Processors) ex article 47 in place to ensure there is no undermining of the GDPR as meant in article 44?

    The use that can be made of BCR-Ps (BCR for processors) is not limited to intragroup transfers but they can also be used for EU controllers transferring data to processors in a third country. For transferring data to each member of the group of companies belonging to the processor. This has been the intended use of the BCR-Ps from the beginning, and they have been used for such purposes for many years. The main reason for BCR-Ps was to avoid processors of a group of companies having to conclude SCCs with each separate controller, to allow for a global approach to data protection in the outsourcing business. This is in line with the intention of the GDPR to be technological neutral and lessen administrative burden, while at the same time offering an appropriate level of protection. Ensuring that the level or protection of natural persons guaranteed by the GDPR is not undermined. The controller can share data with each member of the group of companies making use of the BCR-P. If such a BRC-P is in place this can be used for transfer from the EU customer/controller to the processor in a third country, or via a third country processor to another third country processor of the same group of companies, or even via a third country customer/controller entity. Central to the use of a BCR-P is that the data – no matter which route is undertaken – is protected as stipulated in the BCR-P.[5] It therefore stands to reason that BCR-Ps can be used to ensure there

[5] See for more information on the BCR-Ps the Explanatory Document on the Processor Binding Corporate Rules, WP 204 rev.01: https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2015/wp204.rev_en.pdfl and an article of IAPP members L. Moerel (Professor of global ICT law at Tilburg University and senior of counsel with Morrison & Foerster) and A. van der Wolk (Global Co-Chair Privacy & Data Security with Morrison & Foerster): http://iapp.org/news/a/why-the-edpb-should-avoid-torpedoing-bcrs-for-processors/.

is no undermining of the GDPR as meant in article 44.

12. **Paragraph 14**
    Regarding paragraph 14 of the Guidelines, it would be good to understand what the obligations (practical implementations) for Company A are. Could the EDPB elaborate on this?

13. **Example 5**
    Regarding example 5: what if George is staying on a more permanent basis in the third country (for a couple of months or a year) but is still an employee of and works for the EU based company (is still part of the EU based team and is managed by the EU based company manager). This happens quite a lot with remote teams.
    What if an employee is on secondment (remains employee of the Union based entity but is temporarily stationed abroad) and works for both its employer in the EU and for the third country entity and remotely accesses the database of the EU entity in both capacities?
    What if the employee has a contract with a group entity?

14. **Two affiliates of a multinational enterprise**
    Could the EDPB elaborate on the situation in which data moves between two affiliates of a multinational enterprise? For example, between a multinational HQ in a third country which is subject to the GDPR ex article 3, and its European affiliate subsidiary (also subject to the GDPR)?

15. **Paragraph 17**
    In paragraph 17 is stated that even if a data flow is not a transfer within the context of the Guidelines, the controller must comply with article 48 (of chapter V)? But if a data flow does not entail a transfer, Chapter V does not apply, correct? Could the EDPB elaborate on this?

16. **Direct submission of data**
    Regarding the direct submission of data by the data subject, the example used in the Guideline (example 1) pertains to data submitted which is necessary for the performance of a contract. Does the same apply to cookies and other direct transmitted/collected data for which the data subject has given its explicit consent, or which is based on another legal processing ground?
    The EDPB states in paragraph 12 that the disclosure should be directly and on the initiative of the data subject. But even if the disclosure is not on the initiative of the data subject, the data subject can still not be qualified as a controller or processor (exporter). Could the EDPB elaborate why such data flows should be considered a transfer?

Kind regards,

Mrs. Mr. Irvette Tempelman
E-mail: tempelman@vnoncw-mkb.nl
Phone (mobile): +31(0)6 12462344