IRSG RESPONSE 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 IRSG is a practitioner-led body comprising leading UK based representatives from the financial and professional services industry. It is an advisory body both to the City of London Corporation, and to TheCityUK. The Data Committee includes representatives from financial services firms, trade associations, the legal profession, and data providers.

We welcome the opportunity to contribute the following comments, following the EDPB publication of the Guidelines on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR (Guidelines).

In responding, we would like to highlight the following comments from our Members:

1. **We welcome the content and timing of new Guidelines**. The Court of Justice of the European Union's judgement known as "Schrems II"[1] has resulted in many open legal questions and great uncertainty concerning international transfers of personal data which risks hindering economic growth and international trade as we emerge from the global pandemic. While the judgment creates many challenges for business, one of the greatest is the lack of legal certainty. Our members therefore welcome clarification on the key question of what amounts to a "transfer" for the purposes of Chapter V GDPR and the Schrems II judgment and on the interplay between Article 3 and Chapter V of the GDPR.

2. **The definition of transfer.** We welcome the EDPB's clarification of the meaning of transfer for the purposes of Chapter V of the GDPR which will help to resolve a well-known open legal question. We have the following comments on the proposed second criteria:

    a. We welcome the clarification in paragraph 12 of the Guidelines that there can be no transfer effected where the data is disclosed directly and on his/her own initiative by the data subject to the recipient, as there is no controller or processor sending or making the data available.

    b. We welcome the clarification in Example 5 that remote access of personal data from a third country by an employee does not constitute a transfer of personal data, as the employee is an integral part of the controller. This is a sensible and practical outcome for the reality of the employee/employer relationship and an increasingly mobile workforce.

    c. We welcome the clarification in paragraph 15 that for processing to amount to a "transfer" there must be a disclosure from one controller or processor to *a different* controller or processor. There must be "two different (separate) parties" as noted in paragraph 14 of the Guidelines. To require controllers and processors to put in place Chapter V protections for intra-entity processing (unless they qualify as separate

[1] *Data Protection Commissioner* v *Facebook Ireland Limited, Maximillian Schrems* (Case C-311/18)

controllers or processors as in paragraph 16) would put an unduly restrictive administrative burden on organisations and would be of questionable benefit to data subjects where the legal entity is in any event subject to the application of GDPR in its entirety.

d. Regarding example 3 in the Guidelines, namely **"**Processor in the EU sends data back to its controller in a third country" we would welcome the EDPB to re-consider its position and adopt a position which provides that such "re-patriation" disclosures to controllers or processors in third countries should only be a restricted transfer for the purposes of Chapter V GDPR when the underlying decision to make the transfer is also governed by GDPR. The wider proposed interpretation in paragraph 13 and example 3 will deter controllers and processors in third countries from contracting with processors based in the EU putting EU based processors at a commercial disadvantage to their competitors in third countries not subject to GDPR. Further it will add time and complexity when seeking to agree commercial contracts putting EU service providers at a disadvantage. In addition to the extra burden having to address transfer terms in the contract with the EU based processor, controllers and processors in third countries – particularly those in highly regulated sectors – are also concerned about the risk of service interruption in the event of an order to suspend transfers. Such an order could for example have profound implications for firms in the financial services sector which are subject to strict obligations to ensure business continuity. We would welcome the EDPB to align the Guidelines with Module 4 of the EU Commission's new standard contractual clauses which provides that such SCCs are not required for a mere repatriation of personal data.

e. We would welcome the EDPB to re-consider its position that a restricted international transfer occurs if a controller or processor in the EU, which sends data to a controller without an EU establishment but subject to the GDPR constitutes a restricted international transfer. We consider that the better interpretation is that a restricted transfer only takes place where the data importer is not directly subject to GDPR and would welcome that the EDPB add this to the criteria of what constitutes a transfer (paragraph 7 of the Guidelines). The purpose of Chapter V GDPR is to provide protection for data subjects in the event a recipient is subject to privacy legislation which offers less protection for personal data than the GDPR. This is not the case in example 7 – where the data importer is directly subject to GDPR under Article 3(2)(a). Applying Chapter V requirements in this scenario unnecessarily adds to the compliance burden of the data exporter and data importer with no discernible benefit for the data subjects given the data importer is already caught by GDPR.

f. Regarding paragraph 23 of the Guidelines, our understanding of "when developing transfer tools (*which currently are only available in theory*)…" in this paragraph is that it is a reference to a possible transfer tool which will govern transfers from controllers/processors to a controller in a third country with such a controller being subject to the GDPR (by virtue of Article 3(2) GDPR) and with such a tool yet to be published. In the same paragraph, our Members would appreciate clarification with regards to example measures which may be taken by businesses to "*fill the gaps*

relating to conflicting national laws". In many instances, it will be difficult to remedy a conflict of law without a change to the underlying third country legislation.

For any questions or clarifications please contact: IRSGsecretariat@cityoflondon.gov.uk.