

Event summary of the Meet the Author seminar on ‘Territorial scope and data transfer rules in the GDPR: Realising the EU’s Ambition of Borderless Data Protection’ with Prof. Christopher Kuner

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On 20 January 2022, the Brussels Privacy Hub hosted its 12th seminar in the [Meet the Author series](#) on ‘[Territorial Scope and Data Transfer Rules in the GDPR: Realising the EU’s Ambition of Borderless Data Protection](#)’. The online seminar focused on a paper (available [here](#)) with the same name written by **Prof. Christopher Kuner**. The seminar was chaired and moderated by Prof. **Hielke Hijmans** (President Litigation Chamber Belgian Data Protection Authority, Vrije Universiteit Brussels (Institute for European Studies)). It featured comments and contributions by Dr. **Svetlana Yakovleva** (University of Amsterdam) and **Olivier Matter** - (Team Leader for International Cooperation at the European Data Protection Supervisor) and a reaction by Prof. **Christopher Kuner** (Vrije Universiteit Brussel, Maastricht University, Co-Director of the Brussels Privacy Hub), followed by a discussion with the audience. The seminar was held online, with nearly 150 participants.

The seminar kicked off with a short introduction by **Hielke Hijmans** who outlined the area covered in the discussed paper and linked it to the Guidelines 05/2021 recently published by the European Data Protection Board (EDPB) (available [here](#)) dealing with the interplay of Article of the [General Data Protection Regulation](#) (GDPR) and Chapter V. This interplay is also the main theme of the paper by Prof. Christopher Kuner that was at the core of the discussions. Based on the paper and the Guidelines, Hijmans noted several aspects worth further discussion, among them the fact that the EDPB requires the **existence of a controller in the European Union for a transfer** and the **question of the complexity of enforcement of the GDPR**, when personal data are outside its territorial scope.

The first discussant to react on the paper of Prof. Christopher Kuner was **Dr. Svetlana Yakovleva**. She posed five questions concerning the interplay of Chapter V and Article 3 GDPR. The first question was on the true objective of the rules of Article 3 GDPR. Yakovleva noted that in addition to the goal of preventing circumvention of the GDPR that was explained by Kuner in his paper, Article 3 also aimed at ensuring a **level playing field for companies** active in the EU market. The second question was on the exact nature of the conflict between Article 3 GDPR and Chapter V. Yakovleva noted **two different standards of protection** employed by both sets of provisions. While Article 3 GDPR promoted the same level of protection as provided by the GDPR, Chapter V required an essential equivalent level of protection, thus giving some flexibility. In practice, the way these different standards work was not well explored. Yakovleva then asked as a third question, whose task it was in the EU to resolve this conflict between Article 3 and Chapter V. She argued that solving the conflict would actually requires **steps by the EU legislator**. As a fourth question, Yakovleva questioned whether direct collection of personal data from the data subject across the EU’s external borders was not much more common than appears from the EDPB guidance. She was therefore skeptical about removing such processing operations from the scope of transfers as done in the EDPB guidance. She was especially concerned that the exclusion from the definition of transfers of some activities - but not others - would make it difficult to justify the GDPR’s restrictions on transfers of personal data from an international trade law perspective (she referred for the details of this argument to a Blogpost available [here](#)). As a last point, Yakovleva pointed out that a more **granular approach** to the relationship between Article 3 and Chapter V GDPR, such as the one proposed in Kuner’s article, is needed.

The discussions were continued by **Olivier Matter**, who highlighted three aspects of both the paper and the EDPB guidelines that merit further thoughts. First, he questioned whether a **definition for data transfers as proposed by the EDPB was needed at all**. He noted that neither the GDPR nor its predecessor included such a definition, which might thus be a deliberate choice of the EU legislator. On the other hand, due to the complexity of the transfer rules, which apply when there is a transfer, there was a need from the perspective of legal certainty to clarify the term. Second, Matter remarked on what would be the **appropriate scope of application of Chapter V**. He argued that two approaches would have been possible: a jurisdictional approach – requiring that there is a transfer when data leaves the jurisdiction of the GDPR (implying that Chapter V would not apply for the sharing of data with an entity outside the EU but subject to Article 3(2) GDPR for a given processing activity) - , and a territorial approach, focusing on whether data actually have physically left the territory of the EU, in which case both Article 3(2) and Chapter V apply cumulatively. The EDPB has in the end chosen for the latter option resulting in the cumulative application of both sets of rules. He mentioned also that the EDPB guidance were not meant to address all the questions this approach raises, such as on the nature of the appropriate safeguards for transfers to the processing by an entity covered by Article 3(2) GDPR. As a final point, Matter addressed the **issue of enforcement** and noted that the rules centered around the idea that protection should travel with the data. He reminded that enforcement against entities outside of the EU was always difficult in EU law and argued for international cooperation of data protection authorities as the way forward.

In his response to the critical remarks, Christopher Kuner was satisfied that his paper (and also his blogpost available [here](#)) had started a long-needed discussion on the interplay of Article 3 and Chapter V. He also remarked that the paper was written before the guidance but that an updated version was in progress. Reacting to the different arguments made, Kuner first pointed out that the **trade law perspective** of transfer rules pointed out by Yakovleva had indeed been neglected so far and required further research. On the question of the need for a definition, he remarked that he was uncertain whether such a definition was indeed required, since the Court of Justice of the EU (CJEU) seemed to be able to address transfer questions without such a definition in its case law (e.g. [Schrems I](#) and [Schrems II](#)). He also highlighted that it was not transparent who was pushing for a definition of data transfers at EU level. The Commission referred to ‘some stakeholders’ that requested such a definition, but the identity of these stakeholders was not clear and overall, the evaluation process of the GDPR lacked in transparency. He also criticized the **absence of a detailed investigation of the real-world consequences of the cumulative application of Chapter V and Article 3 GDPR**, for example regarding the actual number of cases such an application is required. Finally, Kuner underlined that resolving the issue of Chapter V and Article 3 would probably also require a **legislative solution** that should be carefully drafted after having researched the area sufficiently, and that it was disappointing that the EDPB Guidelines did not raise this point.

The following lively Q&A with the audience raised several other notable aspects to the attention of the panel, such as the role of consent in data transfers, the role of the representative and their liability, and transparency for individuals about data transfers. The whole event has been recorded and can be viewed fully [here](#).