

EDPB publishes draft Guidelines on territorial scope of the GDPR

The European Data Protection Board (EDPB) has published the eagerly awaited [Guidelines 3/2018 on the territorial scope of the GDPR \(Article 3\)](#).

The 23-page Guidelines, which are open to public consultation until 18 January 2019, aim to help EU and non-EU established controllers and processors determine whether their processing operations fall within the scope of the GDPR, and ensure a consistent approach to the application of the GDPR. This note considers some of the EDPB's key recommendations and examples of when the GDPR does or does not apply.

The GDPR expands the territorial scope of EU data protection law, capturing controllers and processors with an “*establishment*” in the EU who process personal data in the context of that establishment, as well as controllers and processors outside the EU who offer goods and services to, or monitor the behaviour of, data subjects in the EU (i.e. those who “*target*” EU data subjects).

The Guidelines are split into four sections, Firstly, they consider the application of the “*establishment*” criterion in Article 3(1); secondly, the “*targeting*” criterion in Article 3(2); thirdly, the application of the GDPR to processing by a non-EU established controller in a place where Member State law applies by virtue of public international law under Article 3(3); and fourthly, the requirement for a representative to be appointed by a non-EU established controller or processor.

1. Application of the “*establishment*” criterion – Article 3(1)

Article 3(1) of the GDPR provides that the “*Regulation applies to the processing of personal*

data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.”

The EDPB recommends a **threefold approach** to determining whether or not a controller or processor has an EU establishment and processes personal data in the context of the activities of that establishment, as set out below:

a. Does the controller or processor have an “*establishment*” in the EU?

b. Does the controller or processor process personal data “*in the context of the activities of*” the establishment?

c. Where does the processing take place?

a. Does the controller have an “*establishment*” in the EU?

The EDPB highlight that whilst the concept of “*main establishment*” is defined in Article 4(16) of the GDPR (which is relevant for the purpose of identifying which data protection authority is the controller or processor’s lead authority in relation to cross-border processing, and application of the one-stop shop), the GDPR does not provide a definition of “*establishment*” for the purpose of Article 3.

However, Recital 22 GDPR provides that “*establishment implies the effective and real exercise of activities through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect*”. This wording is identical to that found in Recital 19 of the Data Protection Directive 95/46/EC, and the EDPB confirm therefore that the CJEU’s interpretation of the meaning of “*establishment*” in the cases of *Google Spain* (C-131/12), *Weltimmo* (C-230/14), *Amazon* (C-191/15), and *Schleswig-Holstein* (C-210/16) remains relevant under the GDPR. Accordingly, the concept of “*establishment*” extends to any real and effective activity – even a minimal one – exercised by a controller or processor through stable arrangements. Both the degree of stability of the arrangements and effective exercise of activities in that Member State must be considered in light of the specific nature of the economic activities and the provision of services concerned.

Example

The EDPB consider the scenario of a car manufacturing company with headquarters in the US and a fully-owned branch and office located in Brussels overseeing all operations in Europe, including marketing and advertisement. The EDPB indicate that the Belgian branch could be considered to be a “*stable arrangement*”, which “*exercises real and effective activities*” in light of the nature of economic activity carried out by the car manufacturing company. Therefore the Belgian branch could be an EU “*establishment*”, within the meaning of the GDPR (Example 1).

b. Does the controller or processor process personal data “*in the context of the activities of*” the establishment?

Once it is concluded that a controller or processor is established in the EU, the EDPB indicate that an analysis should follow to determine whether the processing is carried out “*in the context of the activities of*” the establishment”. In order to determine same, the EDPB recommend considering (i) *the relationship between the non-EU based controller or processor and a local EU establishment*, in particular, whether there is “*an inextricable link*” between the activities of the EU establishment and the processing carried out by a non-EU controller or processor. If so, the GDPR will apply. The EDPB also recommends considering (ii) whether any *revenue raising* is taking place by an establishment in the EU, and if such activities can be considered as “*inextricably linked*” to the processing of personal data taking place outside the EU and individuals in the EU, which may be sufficient for the GDPR to apply.

Example

The EDPB provide the example of an e-commerce website operated by a company based in China. Whilst the processing activities are exclusively carried out in China, the company has an EU office based in Berlin which leads and implements marketing campaigns towards EU markets. The EDPB state that the activities of the Berlin office are “*inextricably linked*” to the processing of personal data by the Chinese e-commerce website, insofar as the marketing campaign towards the EU make the service offered by the Chinese e-commerce website profitable. The processing of personal data by the Chinese website can therefore be considered as carried out in the context of the activities of the Berlin office, and subject to the GDPR (Example 2).

c. Where does the processing take place?

The EDPB confirm that the place of processing is irrelevant in determining whether the processing falls within the scope of the GDPR. Rather, it is the presence,

through an establishment of a controller or processor in the EU and the fact that processing takes place in the context of the activities of that establishment that triggers the application of the GDPR. The EDPB importantly clarify that the text of Article 3(1) (unlike Article 3(2)) does not restrict the application for the GDPR to the processing of personal data of individuals who are in the EU. Therefore the location or nationality of a data subject whose personal data are being processed is also irrelevant. This approach is supported by Recital 14 of the GDPR.

Example

The EDPB consider the scenario of a pharma company with headquarters in Stockholm, which has located all its personal data processing activities regarding its clinical trial data in its Singapore based branch. The branch is not a distinct legal entity, and the Stockholm headquarters determines the purpose and means of the processing carried out on its behalf by its Singapore based branch. The EDPB notes that whilst the processing activities take place in Singapore, the processing is carried out in the context of the activities of the pharma headquarters in Stockholm (i.e. of a data controller established in the EU), and therefore the GDPR applies to such processing (Example 5).

processor, who is not subject to the GDPR, will therefore become indirectly subject to some obligations imposed by controllers subject to the GDPR, by virtue of contractual arrangements under Article 28. In addition, the EDPB note that the conditions laid down in Chapter V of the GDPR, concerning transfers of personal data to third countries, may need to be complied with.

The EDPB also consider the situation where a controller, who is not established in the EU, instructs an EU established processor. The EDPB confirm that the processor will be subject to the GDPR provisions directly applicable to processors, such as the obligation under Article 28 to enter into a data processing agreement; not to process personal data except on the instructions of the controller (unless required to do so by EU or Member State law); to immediately inform the controller if an instruction infringes the GDPR or other EU or Member State law, and to comply with Chapter V GDPR concerning international transfers to third countries. However, the EDPB indicate that the non-EU controller will not become subject to GDPR controller obligations by virtue of Article 3(1) merely because it instructs an EU established processor (although it may still be caught by Article 3(2)).

2. Application of the “targeting” criterion – Article 3(2)

d. Application of the “establishment” criterion to controller or processor

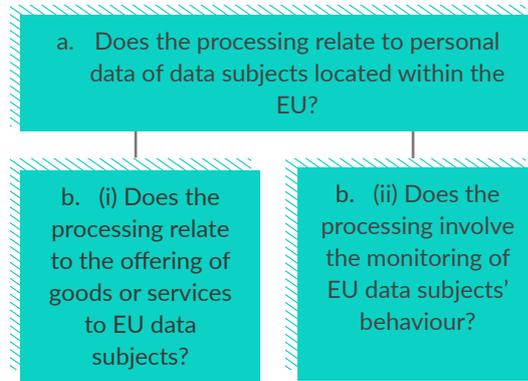
In considering the threefold approach set out in (a)-(c) above, the EDPB highlight that the existence of a relationship between a controller and a processor does not necessarily trigger the application of the GDPR to both, should one of these two entities not be established in the EU.

The EDPB clarify that where a controller in the EU, uses a processor located outside the EU and not subject to the GDPR, it will be necessary for the controller to ensure by contract or other legal act that the processor processes the data in accordance with the GDPR. The controller will need to put a contract in place addressing all the requirements set out in Article 28(3). A

Article 3(2) sets out the circumstances when the GDPR applies to a non-EU established controller or processor. It provides that *“this Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.”*

The EDPB confirm that in the absence of an establishment in the EU, a controller or processor cannot benefit from the one-stop-shop mechanism, and such controllers or processors should ensure they comply with data protection legislation applicable at national level which may vary from one Member State to another.

In assessing the application of the “targeting” criterion, the EDPB recommends a **twofold** approach, as set out below.



a. Does the processing relate to personal data of data subjects located within the EU?

The EDPB considers that the application of the targeting criterion under Article 3(2) is not limited by the nationality or place of residence of the data subject – rather the location of the data subject in the territory of the EU “at the moment when the relevant trigger activity takes place” is the determining factor (i.e. at the time of offering the goods or services or when the behaviour is being monitored). The element of “targeting” individuals in the EU must also be present to trigger the application of the GDPR to the non-established controller or processor. In addition, the EDPB clarify that the processing of personal data of EU citizens or residents that occurs in a third country does not trigger the application of the GDPR.

Example

A bank in Taiwan has customers that are residing in Taiwan but hold German citizenship. The bank is active only in Taiwan; its activities are not directed at the EU market. The bank’s processing of personal data of its German customers is not subject to the GDPR (Example 10).

b. (i) Does the processing relate to the offering of goods or services to EU data subjects?

The first activity triggering the application

of Article 3(2)(a) is the “offering of goods or services” to EU data subjects, irrespective of whether a payment by the data subject is required. The EDPB suggest that the CJEU judgment of *Heller* (Joined cases C-585/08 and C-144/09), concerning what it means to “direct activity” within the meaning of Article 15(1) of the Brussels I Regulation (44/2001), is of assistance when considering what amounts to “offering goods or services” under the GDPR. In *Heller*, the CJEU held that a trader could be considered to be “directing” its activity to the Member State of the consumer’s domicile, where the trader has manifested its intention to establish commercial relations with such consumers.

The EDPB lists a number of other factors to be taken into consideration when assessing whether a trader is “offering goods or services” to EU data subjects, such as the mention by a controller or processor of dedicated addresses or phone numbers to be reached from an EU country. The EDPB highlight that, as provided in Recital 23, that the mere accessibility of a non-EU controller or processor’s website in the EU does not provide sufficient evidence to demonstrate an intention of the non-EU controller or processor to offer goods or services to EU data subjects.

Example

A private company based in Monaco processes personal data of its employees (many of whom are French and Italian residents) for the purposes of salary payment. The EDPB notes that human resources management, including salary payment by a third country company, cannot be considered as an offer of services to EU data subjects and is therefore not subject to the GDPR (Example 13).

b. (ii) Does the processing involve the monitoring of EU data subjects’ behaviour?

The second type of activity triggering the application of Article 3(2)(b) is the monitoring of data subjects’ behaviour insofar as their behaviour takes place within the EU. The EDPB does not consider that any online

collection or analysis of personal data of EU individuals would automatically count as “monitoring”. It will be necessary to consider the controller’s purpose for processing the data, and any subsequent behavioural analysis or profiling using that data. The EDPB indicate that monitoring EU data subjects’ behaviour could encompass a broad range of activities, including behavioural advertising; geo-localisation activities, online tracking using cookies or fingerprinting; CCTV etc.

Example

A marketing company established in the US provides advice on retail layout to a shopping centre in France, based on an analysis of customers’ movements throughout the centre collected via WiFi tracking. The analysis of the customers’ movements constitutes monitoring of their behaviour. As the shopping centre is located in France, the data subjects’ behaviour takes place in the EU. The marketing company is a data controller and subject to the GDPR in respect of the analysis of the monitoring of the EU customers’ behaviour, and will have to designate a representative in the EU under Article 27 (Example 15).

3. Processing in a place where Member State law applies by virtue of public international law

Article 3(3) provides that “[t]his Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law”. This provision is expanded upon in Recital 25 which states that “[w]here Member State law applies by virtue of public international law, this Regulation should also apply to a controller not established in the Union, such as in a Member State’s diplomatic mission or consular post.”

The EDPB confirm that the GDPR applies to personal data processing carried out by EU Member States’ embassies and consulates, insofar as such processing falls within the material scope of the GDPR, as defined in Article 2.

4. Representative of controllers or processors not established in the EU

Data controllers or processors who are not established in the EU, but are subject to the GDPR under Article 3(2), may be under an obligation to designate a representative in the EU. The EDPB provide some guidance on the designation process, exemptions, establishment obligation and responsibilities of the EU representative pursuant to Article 27 (and Recital 80).

In particular, the EDPB note that the function of a representative in the EU may be exercised based on a service contract concluded with an individual or an organisation, and can therefore be assumed by a wide range of commercial and non-commercial entities, such as law firms, consultancies, private companies etc., provided that such entities are established in the EU. However, whilst the function of representative may be assumed by a company, the EDPB recommend that a single individual be assigned as a lead contact.

The EDPB does not consider the function of a representative in the EU as compatible with the role of an external DPO, given that a DPO is required to perform its tasks with a sufficient degree of autonomy and without any instructions, whilst the representative must be appointed pursuant to a written mandate by a controller or processor and is under its direct instruction.

Conclusion

The Guidelines are helpful in clarifying the territorial scope of the GDPR, particularly in relation to the scope of the application of the GDPR to processing by an EU controller using a non-EU processor and vice versa. As the draft guidelines are open to consultation for the next 8 weeks, amendments may be made by the EDPB before the finalised guidelines are published in 2019.

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