Guidelines on the territorial scope of the GDPR

Framework

Dear Ladies and Gentlemen,

We would like to inform you that recently the European Data Protection Board[1] ('Board') has released its guidelines clarifying the territorial scope of the General Data Protection Regulation ('GDPR').

As you may already know, the GDPR may be applicable to companies operating outside the EU in case of:

- Processing of personal data by the non-EU controller/processor being carried out in the context of the activities of an **establishment** of such controller/processor in the EU, regardless of whether the processing takes place in the EU or not ('Establishment Test').

- Processing of personal data of data subjects located in the EU by a controller/ processor **not established** in the EU, if processing activities relate to:

  - 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

  - the **monitoring** of their behaviour as far as their behaviour takes place within the European Union ('Targeting Test').

The criteria above require thoughtful analysis of both legal (e.g., what establishment under the EU law means) and not purely legal concepts (e.g., what factors indicate that processing is carried out in the context of a local establishment's activities, etc.).

The Board presented its vision on a number of questions being raised by the companies concerned (especially in non-EU jurisdictions). Below, you will find a brief summary of the guidelines provided by the Board for public consultations closed on 18th January 2019[2]. We hope that it will help you to find answers you are looking for, or at least be a good starting point to study the guidelines in depth.

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[1] Independent EU body in charge of clarifying data protection laws and ensuring their consistent interpretation.

[2] The guidelines may be changed later in a view of feedback received in the course of public consultations. We will keep you posted.

Establishment Test

KEY QUESTIONS THAT SHALL BE ANALYSED WITHIN THE ESTABLISHMENT TEST

- Does a Russian company act as a data controller, or data processor?

- Is there anything linking the company with the EU markets (not necessarily branch/representative office in the EU) and may this be considered an establishment in the EU?

- Does the company process personal data in the context of the activities of that EU establishment? May such processing be considered as being closely linked to that EU establishment?

ESTABLISHMENT IN THE EU

- Formalistic approach (whereby the establishment is a place where undertakings are registered) is not acceptable;

- Notion is broad but at the same time it has its limits, e.g., merely because company's website is accessible in the EU does not lead to establishment in the EU;

- Analysis is always on case-by-case basis.

CONTEXT OF ACTIVITIES

- Even if EU establishment does not take any role in the data processing, the activities of such establishment, and the data processing carried out of a data controller/ processor outside the EU, may be still considered as being closely linked to that establishment.

Example given by the Board

An e-commerce website, owned by a company based in China, established a European office in Berlin to run marketing campaigns directed towards EU markets. All data processing activities are carried out only in China. In this case, this processing outside the EU is inextricably linked to the activities of the EU office.

PLACE OF DATA PROCESSING (IN THE EU, OR NOT)

- Place of data processing is not relevant to determine applicability of the GDPR. What matters is presence of the data controller/ processor in the EU (through an establishment) and processing which is carried out in the context of the activities of the local establishment.

Establishment Test

A French company developed a car-sharing application, targeting customers only in Morocco, Algeria and Tunisia. The service is only available in those three countries, but all personal data processing activities are carried out by the data controller in France. Although processing does not relate to individuals in the EU, it is carried out in the context of the activities of the EU establishment in France. Therefore, the GDPR applies.

A pharmaceutical company, with its headquarters in Stockholm located all its personal data processing activities (relating to clinical trial data) in its branch in Singapore. According to the company structure, the branch is not a legally distinct entity and the Stockholm office determines the purpose and other terms of the data processing, carried out on its behalf by the branch. Processing in Singapore is carried out in the context of Stockholm company's business and therefore shall be subject to the GDPR.

WHAT IF NON-EU COMPANY (NOT SUBJECT TO THE GDPR) ACTING AS A PROCESSOR WAS ENGAGED BY THE EU CONTROLLER (SUBJECT TO THE GDPR)?

- The controller will be obliged to ensure, by contract, that the processor processes personal data in accordance with the GDPR. Therefore, the processor not subject to the GDPR will be indirectly subject to certain obligations (not all requirements!) contractually.

WHAT IF A NON-EU COMPANY ACTING AS A DATA CONTROLLER (NOT SUBJECT TO THE GDPR) WILL ENGAGE AN EU DATA PROCESSOR (SUBJECT TO THE GDPR)?

- The GPDR sets out different obligations applicable to data controllers and data processors separately.

- A non-EU controller does not fall into the scope of the GDPR by simply engaging an EU processor.

- However, an EU processor in any case will be subject to certain obligations imposed by the GDPR.

- Please pay attention, that under the GPDR, a processor shall immediately inform the controller if, in its opinion, an instruction infringes the GDPR, or other applicable EU data protection provisions.

Targeting Test

KEY QUESTIONS THAT SHALL BE ANALYSED WITHIN THE TARGETING TEST

Companies having no establishment in the EU may still be subject to the GDPR. The Board suggests a twofold exercise to determine applicability of the GDPR. It implies analysis of two questions:

- Does the data processing relate to personal data of data subjects located in the EU? and

- Does the data processing relate to offering goods/services or monitoring behaviour of these data subjects?

DATA SUBJECT LOCATED IN THE EU

- The test does not imply assessing nationality, or place of residence.

- Data subject(s) must be located in the EU at the moment when good/service is offered/behaviour is monitored.

Example given by the Board

A company established in the USA, without any presence in the EU, provides a city-mapping application for tourists. The application processes personal data concerning the location of customers using the app, once they start using the application in the city they visit, in order to offer targeted advertisements.

The application is available for tourists visiting New York, Paris, and London. Such processing falls within the scope of the GDPR, as the company is offering services to the individuals in the EU.

If the app was exclusively directed at tourists (even if these tourists were EU citizens) in the U.S., the processing would not be subject to the GDPR.

- The element of targeting is crucial; the mere fact that company process data of individuals in the union does not trigger application of the GDPR.

Example given by the Board

A bank in Taiwan has customers that are residing in Taiwan, but hold German citizenship. The bank is active only in Taiwan; its activities do not target EU market. Processing of the German citizens' data is not subject to the GDPR, in this case.

TARGETING CRITERIA

The Board gave some examples indicating that non-EU company offers its services/ goods to the data subjects in the EU, below are some of them:

- The EU, or at least one Member State is designated, by name with reference to the offered good/service;

- The international nature of the activity of non-EU company (e.g., tourism);

Targeting Test

- The mention of addresses, numbers to be reached from the EU country;

- The use of a top-level domain name, other than that of the third country in which non-EU controller/processor is established;

- The payments for Internet referencing services, in order to facilitate access to service, by consumers in the EU;

- The use of a language, or a currency, other than that generally used in the trader's country;

- The marketing campaigns directed at EU audience;

- The offer of the delivery of goods in the EU.

Please bear in mind that mere accessibility of the website, email address or other contact details are not sufficient evidence of offering goods/services to data subjects in the EU.

MONITORING CRITERIA

Monitoring implies that there is specific purpose(s) for use of the data, collected in the course of such monitoring. The Board gives the following examples in this regard:

- Behavioural advertisement;

- Geo-localisation activities, in particular for marketing purposes;

- Online tracking, through the use of cookies, or other tracking techniques (such as fingerprinting);

- Market surveys and other behavioural studies based on individual profiles.

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