

NEWS

EXTRA-TERRITORIAL SCOPE OF THE GDPR: THE EDPB FINALLY PUBLISHES ITS DRAFT GUIDELINES

SCOPE AND CONTENT OF THE GUIDELINES

The guidelines published by the EDPB on various topics aim to achieve a uniform application of the GDPR, which with 99 articles and 173 recitals is quite substantive while nevertheless leaving room for interpretation on numerous aspects. This was viewed with concern by many companies, in particular because of the high penalties incurred under the regulation.

Art. 3 of the GDPR defines the territorial scope of the Regulation on the basis of two main criteria: the “establishment” criterion and the “targeting” criterion. Where one of these two criteria is met, the relevant provisions of the GDPR will apply to the processing of personal data by the concerned controller or processor.

The guidelines provide for legal clarification regarding the application of (i) the establishment in the European Union (“EU”) criterion, (ii) the targeting criterion (including the monitoring of behavior concept) and (iii) the designation of an EU representative requirement. The EDPB provides about 20 examples to illustrate its explanations and make it easier to assess whether the criteria are met in a particular situation.

THE ESTABLISHMENT CRITERION

According to Art. 3 para. 1, the GDPR applies “[...] in the context of the activities of an establishment in the Union”. As expected, the guidelines specify that the term “establishment” shall be interpreted broadly and could be met with only one individual employee if he or she achieves a “sufficient degree of stability”.

An in concreto analysis of whether the data process is carried out in the context of the activities of this establishment will therefore have to be under-

The General Data Protection Regulation (“GDPR”)—and in particular its extraterritorial scope—has caused quite some unrest among Swiss companies since its entry into force on May 25th, 2018. Indeed, the conditions triggering an extra-territorial application of the regulation left much room for interpretation.

On November 23rd, 2018, the European Data Protection Board (“EDPB”) published draft guidelines on the territorial scope of the GDPR (guidelines 2018/3, the “guidelines”).

taken. In this respect, the guidelines indicate that it is sufficient that the activity of the establishment and the data processing are inextricably linked for the criterion to be met. This will be the case, for example, if the establishment generates revenues for the main company, regardless of whether the processing takes place in the Union or not.

The guidelines also confirm that the criterion applies to both data controllers and data processors.

THE TARGETING CRITERION

According to Art. 3 para. 2 of the GDPR, the 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 behavior as far as their behavior takes place within the Union”.

In assessing the conditions for the application of this criterion, the EDPB recommends a twofold approach, i.e. to determine (i) if the processing relates to personal data of data subjects who are in the Union, and (ii) whether it relates to the offering of goods or services or to the monitoring of data subjects’ behavior in the Union.

The EDPB specifies that the offer must be addressed to persons who are in the EU at the time of the offer. In addition, it must be apparent that the controller envisages offering goods or services to data subject in the EU. In this context, the EDPB mentions various evidences that may indicate targeting, including marketing and advertising campaigns aimed at the EU or certain Member States,

the express mention of a Member State directly in connection with an offer, the use of EU-related top-level domains (.de; .eu etc.) or the use of a language or currency not used in the provider's country (*i.e. Euro*) that is customary in a EU country.

In application of these guidelines, there is for example no targeting of EU data subjects if the University of Zurich offers Master courses and requires sufficient knowledge of German and English, because this applies to all applicants, regardless of whether they come from Switzerland, the EU or another country. The case would be different if the course would be directly advertised in Germany and Austria and the payment of the fees can take place in Euros.

One interrogation that remains is how the targeting of international clients as a whole, e.g. in Spanish for Latin America, will be treated under Art. 3 para. 2 of the GDPR.

With respect to the targeting criterion, the EDPB equally offers some guidance about the notion of "monitoring of behavior". Contrary to certain opinions, the guidelines expressly state that such behavior does not need to occur via the Internet, but could possibly occur via other networks or technologies, citing "wearables" or other "smart devices" as examples.

However, not every type of behavior monitoring will fall under the notion and it is only if a further analysis based on the monitoring is carried out, e.g. "profiling" as it is the case with personalized advertising, geolocation for marketing purposes or video surveillance that the monitoring will trigger

the application of the GDPR.

The EDPB guidelines finally confirm that data controllers or processors subject to the GDPR as per Art. 3 para. 2 are under the obligation to designate a representative in the Union and offer some clarifications about the designation process. Art. 27 para. 2 of the GDPR provides for exemptions from the designation obligation if the processing is occasional or carried out by a public authority or body. Unfortunately, the guidelines provide no clarification to this respect.

CONSEQUENCES FOR COMPANIES IN SWITZERLAND AND NEXT STEPS

As flagged above, while the draft guidelines are welcome, some specific points will still require to be clarified, by case-law most probably. The good news is that the guidelines prove those who were claiming that the mere possibility of accessing a website from the EU would trigger the application of the GDPR wrong. However, the EDPB makes no distinction between big and small players and confirms that once the GDPR applies, it does so in its full scope. It is then not sufficient to publish GDPR-compliant privacy or cookies policies on a website and requirements such as the designation of a representative become relevant. For small actors who do not wish to fall under the GDPR's scope, the guidelines then provide interesting indications about what to avoid, notably with respect to targeting EU data subjects.

As indicated above, the guidelines are a first draft and are now open for public consultation, which will undoubtedly prove interesting.

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