EDPB's guidelines on territorial scope — clarifications and uncertainties

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In November 2019, the European Data Protection Board ('EDPB') adopted the final guidelines on the territorial scope of the EU General Data Protection Regulation ('GDPR') (the 'Guidelines', copy at www.pdpjournals.com/docs/888030). The Guidelines seek to assist regulators and organisations, especially those based outside the EU, in assessing whether certain processing activities fall within the jurisdictional reach of the GDPR and when they do, on the requirement to appoint a representative in the Union pursuant to Article 27 GDPR.

Whilst it is clear that the EDPB considered the feedback received during the public consultation, and has provided some valuable clarifications, the Guidelines do leave areas of uncertainty. This article looks at both the clarifications and the uncertainties.

The establishment criterion in Article 3(1) GDPR

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. Non-EU controllers and processors can be caught by the GDPR if they process personal data in the context of an establishment in the EU.

The EDPB reaffirms the broad interpretation of the notion of 'establishment' in the Court of Justice of the EU's ('CJEU') previous rulings (e.g. *Google Spain* and *Weltimmo*) and confirms that it extends to any (even minimal) real and effective activity exercised through stable arrangements. It further confirms that the threshold for stable arrangement can be very low, in particular where it relates to the provision of services online. Even a single employee, or agent, of a non-EU entity based in the EU with a sufficient degree of stability may constitute a stable arrangement, depending on the specific nature of the relevant economic activities. Although the notion of establishment is undeniably broad, the EDPB stresses that it does have its limits — e.g. mere accessibility of a non-EU undertaking's website in the EU, would not mean that such non-EU undertaking has an establishment in the Union.

In line with the CJEU's rulings, the Guidelines confirm that some commercial activities carried out by a non-EU entity in the Union may be so far removed from the processing of personal data that they would not bring the processing within the scope of the GDPR. The EDPB recommends that each determination of whether the processing is in the context of the activities of an establishment in the Union should be based on the specific facts of the case, assessed in light of the relevant case law. An indicator of a potentially relevant 'context' referred to by the EDPB is where there is an inextricable link between the data processing by a non-EU controller/processor and the activities of its EU establishment. This may be the case where revenue raising activity by an EU establishment (such as a local sales office) takes place in connection with the data processing activities of the non-EU entity. The Guidelines clarify that the EU establishment itself does not need to play any role in the processing.

The EDPB confirms that factors such as the place of processing, the location of data subjects or their nationality are irrelevant for the purpose of determining whether the processing is carried out in the context of the activities of an EU establishment.

Application in the controller-processor relationship

The Guidelines clarify that in a controller-processor relationship, the application of the GDPR must be considered separately in relation to the processing carried out by each entity. Non-EU controllers that instruct EU processors will welcome the confirmation that such processors will not be considered an establishment of the controller merely by virtue of acting as its processor.

The EDPB reiterates that EU processors will be subject to the GDPR provisions directly applicable to processors even when providing services to controllers whose processing activities are not subject to the GDPR. As these 'GDPR processor obligations' include the provisions of Chapter V on interna-

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tional transfers of personal data, processors will have to comply with the requirement to put in place appropriate safeguards (where there is no applicable adequacy decision or derogation). This may prove difficult as 'processor to controller' EU Standard Contractual Clauses do not exist. Disappointingly, the Guidelines do not address this problem. The Guidelines also remind EU controllers that the processing activities of an EU controller will not fall outside the scope of the GDPR as a result of instructing a non-EU processor and in that case, an EU controller will need to put in place a contract incorporating the requirements set out in Article 28 GDPR.

The targeting criterion in Article 3(2) GDPR

Pursuant to Article 3(2) of the GDPR, businesses from all over the world can find themselves subject to the GDPR's long-arm jurisdictional reach, if their data processing relates to one of two types of business activity:

- offering of goods or services (including for free) to data subjects who are in the Union (regardless of their citizenship) at the time when the trigger activity takes place; or
- monitoring of the behaviour of such data subjects.

The Guidelines clarify that Article 3(2) GDPR is intended to catch only data processing related to intentional targeting of individuals in the EU through these two types of activity. Article 3(2) of the GDPR will not apply to the processing of personal data of individuals in the EU which does not involve intentionally targeting those individuals, such as where those individuals are inadvertently or incidentally offered services or monitored. This might be the case where a service which is offered to non-EU individuals remains accessible when they visit the Union.

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In relation to the Article 3(2)(a) targeting criterion, the Guidelines endorse factors adopted from European consumer protection law that indicate the intention to offer goods or services to data subjects in the Union, such as:

- directing marketing campaigns at an EU country or taking steps to increase the visibility of a website to consumers in the EU;
- use of language/ currency of a Member State (if different to that of the trader's country); and
- offering a delivery service in the EU Member States.

Some factors taken alone (e.g. the mere accessibility of a website in the Union), are unlikely to constitute targeting, but it should always be considered on a case-by case basis.

One of the examples provided in the Guidelines clarifies that the making of salary payments to a non-EU company's employees working remotely in the EU will not constitute an offer of goods or services. It is not clear, however, whether the offering of benefits to the EU employees by the non-EU employer could, in some circumstances, be treated differently and trigger the application of Article 3(2)(a) of the GDPR.

In relation to the second type of targeting activity, i.e. the monitoring of data subjects' behaviour (Article 3(2)(b) of the GDPR), the Guidelines sensibly clarify that online collection or analysis of personal data of individuals who are in the EU does not automatically amount to the 'monitoring' of their behaviour, and that the purpose of the processing, in particular any subsequent behavioural analysis or profiling, must always be considered. In the light of the examples of 'monitoring' provided by the EDPB (i.e. behavioural advertising; geolocation, in particular for marketing purposes; online tracking through cookies or other tracking techniques; personalised diet and health analytic services online; CCTV; market surveys and other behavioural studies based on individual profiles; and monitoring or regular reporting on the status of an individual's health), Article 3(2)(b) GDPR is likely to apply to the activities of a large number of non-EU online providers processing personal data of their EU customers and non-EU advertisers monitoring online activities of the EU individuals.

Given the broad application of European data protection law in the CJEU's previous judgments and the fact that both criteria in Article 3(2) GDPR are potentially broad and not clear-cut (even in the light of the Guidelines), it may be safest for non-EU organisations to err on the side of caution when considering the jurisdictional reach of the GDPR to their activities. However, as confirmed by the Guidelines, only those processing activities of non-EU controllers/ processors that are 'related to' the relevant trigger activity will be within the scope of the GDPR. As such, the fact that only one processing activity falls within the scope of the GDPR does not render all other personal data processing activities within the scope of the GDPR. This is a helpful clarification, particularly for those non-EU organisations that split their customer data into an 'EU' and a 'non-EU' sets.

Application to the controller - processor relationship

Following feedback from the public consultation, the EDPB included in the Guidelines a new section on the application of the GDPR to the processing carried out by non-EU processors on behalf of non-EU controllers to which

the GDPR applies pursuant to Article 3(2). It is a notable change, as the EDPB clarifies that the processing activities will fall within the territorial scope of the GDPR, as far as they are 'related' to the targeting activity of the controller, which triggered the application of Article 3(2) GDPR. The EDPB focuses on the connection between the processing activity and the targeting of EU data subjects. If such connection is established, the processor will be subject to the GDPR in respect of that processing activity. The examples of such connection provided in the Guidelines indicate a broad application of the territorial scope of the GDPR here. One example concerns a non-EU controller targeting EU customers and using a US-based cloud service provider for its data storage. In the example, the cloud provider is said to be caught by the GDPR, as it carries out processing on behalf of the controller which is related to the targeting of EU individuals by the controller.

The Guidelines are somewhat unclear on whether the EDPB's broad application of the targeting criterion to non-EU processors would apply also in processing arrangements where the controller is established in the Union (i.e. where the processing activities of the non-EU processor are related to the targeting activity carried out by an EU based controller).

The extraterritorial scope of the GDPR and provisions on international data transfers

Disappointingly, the EDPB has not provided guidance on the interplay between the application of the extraterritorial scope of the GDPR and the provisions of Chapter V on international data transfers. The Guidelines remain silent on how non-EU controllers and processors whose processing of personal data is subject to the GDPR pursuant to Article 3 should comply in practice with the restrictions imposed on international data transfers under Chapter V of the GDPR. They do not elaborate on or endorse the UK Information Commissioner's Office's suggestion that, where personal data processing by a non-EU organisation falls within the extraterritorial scope of the GDPR, the data transfer restrictions should not apply (at least initially), as such processing would already be subject to the GDPR and its stringent data protection standards.

Recognising the uncertainties existing in this area of the GDPR's application, the EDPB indicated that it may adopt further guidance, if necessary. This deferred approach may, in part, be due to the ongoing CJEU cases on the validity of Standard Contractual Clauses and Privacy Shield.

Article 27 representatives

Controllers and processors subject to the GDPR pursuant to Article 3(2) are under the obligation (unless they meet the exemption criteria as per Article 27(2) GDPR) to designate a representative in the Union, in one of those Member States where the data subjects are based. The Article 27 representative should be explicitly designated by a written mandate of the controller or of the processor to act on its behalf with regard to its obligations under the GDPR.

The most notable change from the draft guidelines relates to the potential softening of liability of Article 27 representatives. The change of wording from 'enforcement against a representative' to 'enforcement through a representative' seems to confirm that the Article 27 representatives' role is to act as a form of agency for the service of proceedings, a conduit through which Supervisory Authorities can reach the appointing controllers or processors. Given that one of the reasons for introducing the requirement to appoint representatives was to facilitate enforcement proceedings against controllers or processors not established in the Union, Supervisory Authorities will be able to initiate enforcement proceedings through an Article 27 representative, e.g. addressing administrative fines and other enforcement measures imposed on a non-EU controller or processor to its representative, in accordance with Articles 58(2) and 83 GDPR.

The GDPR, however, does not establish a substitutive liability of an Article 27 representative and the designation of a representative in the Union is without prejudice to any legal and regulatory actions against the appointing controller or processor. The possibility to hold an Article 27 representative liable is limited to its direct obligations under the GDPR, i.e. the obligations to keep records of processing (under Article 30) and to respond to information requests from the Supervisory Authority (under Article 58(1)(a)). The EDPB's clarification provides a very strong argument for the conclusion that an Article 27 representative will not be on the hook for the failures of their appointing controllers or processors. This is welcome news that may encourage new entries to the market of EU representative service providers, easing the challenge (and the cost) of finding a representative in the Union.

In terms of the extraterritorial enforcement against organisations that fail to appoint an Article 27 representative, the EDPB confirms that it is working on the development of international cooperation mechanisms under Article 50 GDPR, which will facilitate the enforcement of data protection legislation in relation to non-EU organisations.

Final remarks

Overall, the Guidelines provide some noteworthy clarifications in a rather complex area of extraterritorial application of the GDPR. They are likely to be a useful source of practical guidance for UK and EU companies after the Brexit transition period comes to an end.

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