Response to public consultation on EDPB draft guidelines on territorial scope

Brussels, 18 January 2019

INTRODUCTION

DIGITALEUROPE welcomes the European Data Protection Board's (EDPB) draft guidelines on the GDPR's territorial scope. We believe that the guidelines will be very relevant for controllers and processors operating both within and outside the EU.

In the following sections, we highlight areas where the draft guidelines could further consider the complexities of controller-processor relationships that don't fall squarely within the remit of the GDPR. This will increase clarity and legal certainty along with the draft guidelines' consideration of existing case law from the Court of Justice of the European Union.

THE ESTABLISHMENT CRITERION

DIGITALEUROPE welcomes the draft guidelines' clear reliance on existing case law, which reinforces legal certainty. It should be noted that for processors such case law is not necessarily fully transferable, since the 1995 Directive did not consider the processor as relevant for territorial applicability. This is important to take into consideration, given that the scope of the 'context of the activities of an establishment of a processor' is by definition much narrower than a controller's, since the processor's relevant context of activities in which processing may happen will be determined by the agreement pursuant to Art. 28(3) and the controller's instructions. We would welcome it if the guidelines pointed this out and could add an example to make this clear.

We also welcome the recognition that the criterion relating to 'the context of the activities' is not without limits and 'should not be interpreted too broadly to conclude that the existence of any presence in the EU with even the remotest links to the data processing activities of a non-EU entity will be sufficient to bring this processing within the scope of EU data protection law.'[1]

Example 2 could be adjusted to reflect such limits and clarify that only the 'relevant' processing of personal data by the Chinese company would be considered as carried out in the context of the activities of the European office. Without such clarification, the example may be read to mean that *all* processing activities by the Chinese entity are in scope (including, for example, the processing of Chinese employees located in China).

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[1] P. 6 of the draft guidelines

Processors not subject to the GDPR

DIGITALEUROPE welcomes the clarification that the applicability of the GDPR will be assessed separately for controllers and processors. The EDPB notes 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 Union.' The EDPB also clarifies that 'when it comes to the identification of the different obligations triggered by the applicability of the GDPR, the processing by each entity must be considered separately.'[2]

In this regard, we believe the wording of the draft guidelines could be clearer when describing processing by a controller in the EU using a processor not subject to the GDPR. When suggesting that the controller, who is subject to the GDPR, has to ensure that the processor, who is not directly subject to the GDPR, complies with a processor's obligations under the GDPR, the final guidelines could make it clearer that the conclusion of an agreement in compliance with Art. 28(3) is sufficient in this regard.

Controllers not subject to the GDPR

Regarding the obligations of the processor, certain clarifications would be helpful. The draft guidelines make it clear that a 'non-EU' controller will not become subject to the GDPR simply because it chooses to use a processor in the Union. This is helpful and important. Controllers not subject to the GDPR, but to their own law, will be reluctant to take on additional and burdensome legal obligations, potentially with substantial fines, just because the selected processor is in the EU. Any such interpretation would make EU processors unattractive.

Therefore, we welcome that the guidelines acknowledge limits to processor obligations when it comes to non-EU controllers. Notably, the draft guidelines state that the processor wouldn't need to assist the non-EU controller not falling under the territorial scope of the GDPR in complying with the controller's own GDPR obligations, as clearly such obligations do not exist.

We believe that further clarification in this regard is needed to take into consideration the presence of non-EU controllers that are not subject to the GDPR. EEA processors should only be obliged to meet requirements to the extent they are in their sphere and control (e.g. regarding technical and organisational measures) and where they do not require the non-EEA controller's cooperation (e.g. signing a data processing agreement).

In this regard, we note that data breach notifications may also be challenging, as the processor's ability to comply will be impacted by the inapplicability of the rules to the non-EEA controller. The obligation to disclose the records of processing may also create friction with non-EU controllers not subject to the GDPR, as it could involve the disclosure of their identity.

It should also be considered that the current model clause templates (controller-to-controller and controller-to-processor) are unhelpful in processor-to-controller transfer situations. In our view, transfer instruments, such as model clauses, should not be needed at all when sending non-EEA data back to the non-EEA controller – such transfer merely restores the former state (the non-EEA data is with the non-EEA controller).

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[2] Ibid., p. 9

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2

It may not be practical to list all possible concerns and challenges, but the final guidelines could include an abstract statement recognising the limitations on processors' ability to comply with obligations in case of processing for a non-EU controller, listing a few examples of where this will be the case.

Establishments acting with independence

Many non-EU parent companies operate in Europe through multiple branches or subsidiaries with a considerable degree of independence. This raises the question as to whether processing is carried out 'in the context of the activities' of such 'establishments in the Union' for the purposes of Art. 3(1).

The guidelines recommend that a case-by-case *in concreto* assessment be made to determine whether Art. 3(1) applies. Whilst a case-by-case analysis provides flexibility to accommodate specific circumstances, the final guidelines could incorporate simpler examples involving branches or subsidiaries that lack independence or non-EU entities with clearly no EU presence.

THE TARGETING CRITERION

DIGITALEUROPE welcomes the clear guidance around the application of Art. 3(2)(a). The guidelines emphasise that the element of 'targeting' individuals in the EU – either by offering goods or services to them or by monitoring their behaviour – must always be present. They also clarify that the demonstrable 'intention' of the controller or processor to offer goods or services to a data subject located in the Union is indeed necessary. Example 14 is enlightening in this regard.

While we appreciate the EDPB's reference to Member State law in the third paragraph of this section on p. 12, we believe that the simple list of Articles provided may lead to the impression that the GDPR's territorial scope can be modified by Member States under such Articles. Providing a blanket assumption that the scope of these obligations can be different than that of the GDPR would undermine harmonisation, which is one of the main objectives of the Regulation.

We welcome the clarification under Consideration 1 that the moment when the location of the data subject matters is when the 'trigger activity takes place.' Such clarification could be also included under the next sections on the other aspects of Art. 3(2). This would help address some of the unpredictability in data subjects' movements into and out of the Union. The guidance could in this respect also explicitly acknowledge such unpredictability from the perspective of the controller (and the processor).

We also welcome Example 9 and the clarification that the mere accessibility of a service is not enough to trigger the GDPR's legal obligations.

OFFERING OF GOODS OR SERVICES

DIGITALEUROPE welcomes the draft guidelines' intention to ensure that there needs to be a connection between the processing activity and the offering of goods or services. This should be either a manifested intention or monitoring with the purpose of collecting and processing data related to data subjects in the Union.

We believe more consistency could be achieved across the final guidelines to ensure that all the criteria for falling in the scope are kept in mind. For example, Example 12, paragraph 3 is written in a way that may

suggest that all processing carried out by the Turkish website is subject to the GDPR, while the draft guidelines themselves are clear that only the activity directed at the data subject in Europe should be.

We would also welcome an example around the following scenario. A non-EU subsidiary of a non-EU parent company established in another non-EU country from that subsidiary and which has multiple subsidiaries in Europe processes the personal data of EU citizens, who may currently reside in the EU or the third country in question, in the context of its own local activities. We believe the GDPR would not apply to the processing in question because either the data subjects are not in the EU (EU citizens but not in the Union) or, in the case of EU residents, the processing activities of the non-EU subsidiary are not targeting data subjects in the Union.

MONITORING OF DATA SUBJECTS' BEHAVIOUR

We would welcome more guidance on the nature of the processing activity which can be considered as 'behavioural monitoring.' In particular, we believe the following statement needs further clarification: 'It will be necessary to consider the controller's purpose for processing the data and, in particular, any subsequent behavioural analysis or profiling techniques involving that data.'[3]

The draft guidelines only include examples where individuals are specifically 'targeted' with the type of monitoring examined. However, global companies may analyse customer behaviour from a global customer base at aggregate level – not necessarily anonymised and including therefore EU data subjects – to take business or strategy decisions. We would welcome a clear statement as to whether this type of activity should be excluded from the GDPR's scope.

Processors

As mentioned above in relation to Art. 3(1), the draft guidelines contain very little specific guidance about how to appropriately apply Art. 3(2) to data processors. This could very well be due to the fact that the criteria in Art. 3(2) are hardly applicable to processors. Processors generally do not offer goods or services to data subjects in accordance with Art. 3(2)(a), do not have a relevant intention in the sense of Recital 23, nor do they themselves conduct monitoring of data subjects' behaviour in the sense of Art. 3(2)(b) and Recital 24. However, it would be helpful if the EDPB could make this clearer.

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[3] Ibid., p. 18

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4

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5