

Comments and questions on the Guidelines 3/2018 on the territorial scope of the GDPR (Article 3)

Further to the publication of the guidelines by the European Data Protection Board ("EDPB"), on November 16, 2018 (the "Guidelines"), the law firm Gide Loyrette Nouel ("Gide") notes that several questions regarding the territorial scope of the GDPR remain unanswered and that some clarifications are welcome with respect to the guidance provided by the EDPB within the Guidelines (hereafter *I. Comments regarding the Guidelines*).

Considering this opportunity to submit questions to the EDPB, Gide benefits of the occasion to raise some other points it deems significant within the general context of the GDPR territorial application (hereafter *II. Comments regarding elements not directly addressed in the Guidelines*).

We thank you in advance for this submission opportunity and delightfully look forward to the outcome of the present consultation.

Yours sincerely,

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Partner

I. Comments regarding the Guidelines

1. Section 1.d.ii of the Guidelines: "Processing in the context of the activities of an establishment of a processor in the Union"

i. Case 1

Context

When a processor subject to the GDPR is carrying out data processing on behalf of a data controller established outside the Union and which does not fall under the territorial scope of the GDPR as per Article 3(2) of the GDPR, according to the before last paragraph, page 11 of the Guidelines, the processor will be subject to the relevant GDPR provisions directly applicable to data processors including the provisions on transfers of personal data to third countries or international organisations, as per Chapter V.

The implementation of Chapter V by the processor might result in a situation where the processor will have to impose obligations to a controller not subject to the GDPR. Yet, such situation would be in contradiction with the spirit of paragraph 2, page 12 of the Guidelines stating that : "*However, this does not impose additional obligations on controllers outside the Union not falling under the territorial scope of the GDPR (...)*".

Questions

1. In this context, what does it mean to apply the provisions of Chapter V ?
2. If it means applying appropriate safeguards, such as standard data protection clauses, does the EDPB intend proposing standard data protection clauses for a data transfer from a processor to a controller ?

ii. Case 1.bis

Context

A controller outside the Union which does not fall under the territorial scope of the GDPR (as per Article 3(2) of the GDPR), resorts to a processor subject to the GDPR which then engages another processor outside the EU which is not subject to the GDPR.

Questions

1. Is it necessary to apply the provisions of Chapter V in this context ?
2. If it means applying appropriate safeguards, such as standard data protection clauses, does the EDPB intend proposing standard data protection clauses for a data transfer from a processor to a processor ?

iii. Case 2

Context

A party located in the Union and subject to the GDPR (processor or controller) transfers personal data to another party (processor or controller) located outside of the Union but subject to the GDPR.

Questions

In this context, is it necessary to apply the provisions of Chapter V ? In other words, should such a transfer be considered as an "out of EU" transfer ?

2. Section 4 of the Guidelines "REPRESENTATIVE OF CONTROLLERS OR PROCESSORS NOT ESTABLISHED IN THE UNION"

i. Representative designation

Context

Pursuant to Article 27 of the GDPR, a controller/processor subject to the GDPR without being established in the Union has an obligation to designate in writing a representative within the Union.

Questions

Does the EDPB intend proposing a standard contract with minimal provisions to be implemented for the relationship between a controller or a processor and its representative within the EU ?

ii. Representative responsibility

Context

In Article 78.2 of the COM (2012) 11/4 GDPR draft, dated 2012 January 25, it was provided that : "*Where the controller has established a representative, any penalties shall be applied to the representative, without prejudice to any penalties which could be initiated against the controller*". However, in the current version of the GDPR, the representative's responsibility is only dealt with in Recital 80 which provides in a conditional tense and without reference to penalties that : "*(...) The designated representative should be subject to enforcement proceedings in the event of non-compliance by the controller or processor*".

The last paragraph of the Guidelines, page 23, provides that : "*It should however be noted that the concept of the representative was introduced precisely with the aim of ensuring enforcement of the GDPR against controllers or processors that fall under Article 3(2) of the GDPR. To this end, it was the intention to enable enforcers to initiate enforcement action against a representative in the same way as against controllers or processors. This*

includes the possibility to impose administrative fines and penalties, and to hold representative liable."

Questions

How does the EDPB explain its position on a non-differentiated enforcement against representatives and controllers or processors including with regards to administrative fines, penalties and liability, which is much stricter than the letter of the GDPR ?

II. Comments regarding elements not directly addressed in the Guidelines

1. Unified Data Protection Officer designation mechanism

Context

When applicable, Article 37 of the GDPR provides that a controller or a processor subject to the GDPR pursuant to Article 3 of the GDPR has an obligation to communicate the contact details of its Data Protection Officer ("DPO") to each of the competent supervisory authorities.

As of today, each supervisory authority has its own notification process (usually online in the local language).

Questions

In order to facilitate the designation of DPOs for entities operating in several European countries, has the EDPB considered the creation of a European unified mechanism to designate the DPOs to several competent supervisory authorities at once ?

2. Access to EU data protection national laws

Context

Under the GDPR, Member States are allowed to maintain or introduce national provisions to further specify the application of several rules of the GDPR. Nevertheless, the access to EU local data protection laws supplementing the GDPR has not been centralized and the national laws are not always easy to access.

Questions

Has the EDPB considered the establishment of a European mechanism to make Member State data protection laws accessible in their original language but also in an English version ?

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