



European Data Protection Board Provides Clarifications on Territorial Scope of GDPR

IN SHORT

The Situation: The General Data Protection Regulation has a broad territorial scope and can apply to businesses based outside the European Union.

The Result: The European Data Protection Board has provided important clarifications on the interpretation of GDPR and the criteria to determine its territorial scope.

Looking Ahead: Non-EU based controllers and processors should consider carefully their assessment of whether the GDPR applies to them in light of this draft guidance. If the GDPR applies to a non-EU based controller or processor, they need to designate a representative in the European Union, who will be subject to EU supervision and may be subject to enforcement initiated by the European Union's supervisory authorities.

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The European Data Protection Board ("EDPB") recently released draft guidelines ("Guidelines") providing important clarifications on the territorial scope of the General Data Protection Regulation ("GDPR").

The GDPR has a broad territorial scope and applies on the basis of two main criteria: an "establishment" of a controller or processor in the European Union, or "targeting" activities carried out by a controller or processor not established in the European Union in relation to data subjects in the European Union.



Although still in draft, the Guidelines already provide important clarifications that should be taken into account by businesses for refining their GDPR compliance program.



Establishment Criterion—Context of Processing Activities

The GDPR applies to processing of personal data carried out in the context of an establishment of a controller or processor in the European Union.

In this respect, the Guidelines confirm a broad interpretation of the concept of "establishment." In particular, the EDPB states that: (i) it is not necessary to have a business incorporated in the European Union to be considered as having an EU establishment and (ii) the main criterion is to determine whether there is a real and effective activity exercised through stable arrangements. The EDPB also recalls that the GDPR applies to the processing activities carried out *in the context of* the EU establishment, regardless of whether the actual processing is carried out *by* the EU establishment itself.

Most importantly, the EDPB clarifies that the "establishment criterion" should be applied separately to each of the controller and processor. This statement is key as it implies that a controller established outside of the European Union will *not* be subject to the GDPR on the sole basis that it uses a processor that is located in the European Union. Conversely, a data processor established outside of the European Union and acting for an EU-based customer will *not* be subject to the GDPR solely because its customer is based in the European Union.

Targeting Criterion—Offering Goods and Services, and Monitoring Behavior

In addition to the "establishment criterion," the application of the GDPR to controllers and processors is also triggered when a "targeting criterion" applies, i.e., where the processing of personal data relates to: (i) the offering of products or services to data subjects in the European Union, or (ii) the monitoring of the behavior in the European Union of the data subjects.

In this context, the Guidelines emphasize that the requirement that the data subject be located in the European Union must be assessed *at the moment when the offering or monitoring takes place*—regardless of the duration of the offer or monitoring. In respect of the monitoring of the behavior of data subjects in the European Union, the EDPB states that monitoring implies that the controller has a specific purpose in mind for the collection *and subsequent reuse* of the data about a data subject's behavior for behavioral analysis or profiling.

Role and Obligations of the Representative for Controllers or Processors not Established in the European Union

For controllers and processors that are not established in the European Union but are subject to the GDPR as a result of the "targeting" criterion, the regulation provides that they must designate a representative in the European Union. The representative may be addressed, on behalf of the represented controller or processor, by supervisory authorities and data subjects for all issues related to GDPR compliance.

In respect of the designation of the representative, the EDPB clarifies that it should be in writing and that the representative can be an individual or an organization. The representative can be appointed on the basis of a service contract, but the representative should not be the data protection officer. Once appointed, the representative should be mentioned in the data protection notices provided to data subjects. However, there is no need to notify the appointment of a representative to any supervisory authority.

The Guidelines further state that the responsibilities of the representative must at least include: (i) facilitation of communications between the data subjects and the controller or processor, (ii) maintaining a record of processing activities, jointly with the controller or processor, and (iii) facilitating any exchange with a supervisory authority.

Finally, the EDPB states that the supervisory authorities may initiate enforcement actions against a representative and against the relevant controller or processor, including administrative fines and penalties and to hold the representative liable. In addition, failure for a non-EU established controller or processor that is subject to the GDPR to designate a representative would be an infringement of the GDPR and subject to an administrative fine.

Although still in draft, the Guidelines already provide important clarifications that should be taken into account by businesses for refining their GDPR compliance program.

THREE KEY TAKEAWAYS

1. Territorial application of the GDPR on the basis of the "establishment" criterion should be assessed separately for controllers and for processors.
2. Territorial application of the GDPR on the basis of the "targeting" criterion requires assessing the offering of products/services when such offering is made, and/or assessing the intent to further reuse personal data for behavioral analysis or profiling.
3. Non-EU based controllers and processors subject to the GDPR must appoint an EU representative who will be subject to supervision and regulatory enforcement.

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