

Position Paper

Bitkom views on EDPB Guidelines 3/2018 on the territorial scope of the GDPR (Article 3)

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1. Introduction

Bitkom welcomes the opportunity to comment on the European Data Protection Board's (EDPB) **Guidelines 3/2018 on the territorial scope of the GDPR (Article 3)**.

Bitkom appreciates the Guidelines as they provide clarity and additional guidance to the, to some extent, unclear framework of the GDPR. The Guidelines address some important aspects of the territorial scope, Article 3 is explained in detail and with examples. The corresponding Recitals 22 to 25 are also referenced. The references made to existing case law of the Court of Justice of the European Union (CJEU) could reinforce legal certainty. To some extent, however, the explanations are unfortunately too superficial or overstretch the wording of the law. Furthermore, the references to existing case law should include a detailed assessment of the new wording of Article 3 and its compatibility with the previous cases and the legal framework they were based on.

Overall, Bitkom feels it important that the guidelines make it clear right at the beginning (not just under section 3) that the GDPR only applies if both the territorial and the material scope of the GDPR are met.¹ The Guidelines should also clarify that when the law applies that does not mean just the obligations but also the benefits.

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¹ On page 19, the EDPB makes it clear that the GDPR applies 'insofar as such processing falls within the material scope of the GDPR, as defined in its Article 2'. This clarification shall be introduced right at the beginning of the Guidelines.

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We would like to further elaborate the relevant aspects below.

2. Transfer of existing case law on Directive 95/46/EC to the GDPR

In general, Bitkom welcomes that the Guidelines refer to existing case law, which no doubt reinforces legal certainty.

The EDPB uses the previous case law on Directive 95/46/EC² to explain the respective case constellations and transfers it to the GDPR (see footnotes 6-15). However, the EDPB does not address whether and under what conditions such a transfer is possible at all. In cases where the legal text and the framework have not changed such a transfer can probably be assumed. Where the GDPR differs from the Data Protection Directive, however, the case law has to be assessed with great care and in detail before transferring the judgement to the changed legal framework.

Bitkom would therefore like to raise the following aspects where references to the old case law are made.

3. Article 3 para 1 'in the context of the activities'

The EDPB argues that the conditions of Article 3(1) of the GDPR ('processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union') are to be understood in the light of the relevant case-law, although the relevant judgments were made on the basis of the legal framework of the Data Protection Directive.

Such an assumption is, as already mentioned, questionable, since the legal regulations on the territorial scope of application differ considerably. As the

² Data Protection Directive (DPD).

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EDPB itself states in the introduction, the territorial scope shows a *‘significant evolution [...] compared to the framework defined by Directive 95/46/EC’* (p. 3).

The GDPR defines the territorial scope on the basis of two main criteria: the criterion of *‘establishment’* pursuant to Article 3(1) GDPR and the criterion of *‘targeting’* pursuant to Article 3(2) GDPR. If one of these two criteria is met, the relevant provisions of the GDPR apply to the processing of personal data. The Data Protection Directive, on the other hand, did not include the criterion of *‘targeting’*, its scope ended with the EU-borders. We suggest to rather include references to former case law only on a case by case basis as an assessment is needed whether the ruling’s basis are truly transferrable. The Guidelines should reflect that.

4. Example 2 (page 7)

The second example is cited under the declarations relating to Article 3(1) GDPR:

Example 2: An e-commerce website operated by a company based in China, whereas the data processing activities of which are exclusively carried out in China, has established a European office in Berlin in order to lead and implement commercial prospection and marketing campaigns towards EU markets.

In this case, it can be considered that the activities of the European office in Berlin are inextricably linked to the processing of personal data carried out by the Chinese e-commerce website, insofar as the commercial prospection and marketing campaign towards EU markets notably serve to make the service offered by the e-commerce website profitable. The processing of personal data by the Chinese company can therefore be considered as carried out in the context of the activities of the European office, as an establishment in the Union, and therefore be subject to the provisions of the GDPR as per its Article 3(1).

The application of the GDPR is therefore, in the opinion of the EDPB, justified by the fact that the processing of personal data by the Chinese company can be

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regarded as part of the activities of the European branch, because the activities of the European office are inextricably linked to the processing of personal data. But the EDPB fails to recognise that the CJEU ruling in case C-131/12 - Google Spain and Google (hereinafter 'Google-Spain Decision'), on which this example is based, cannot and should not simply be transferred to the GDPR. The Google-Spain decision was based on the legal situation of the Data Protection Directive, which did not include a reference such as Article 3(2) of the GDPR. Before the case law is applied, its compatibility with the wording of Article 3 should be assessed again.

In the context of the decision, it was above all questionable when data processing operations within the meaning of Article 4(1)(a) of the Data Protection Directive were 'carried out in the context of the activities of an establishment of the controller on the territory of the Member State'.

The question of the scope of the Data Protection Directive was answered to the effect that the Recitals 18 to 20 and Article 4 of the Data Protection Directive in particular would indicate *'in this context that it is clear in particular from recitals 18 to 20 in the preamble to Directive 95/46 and Article 4 thereof that the European Union legislature sought to prevent individuals from being deprived of the protection guaranteed by the directive and that protection from being circumvented, by prescribing a particularly broad territorial scope. In the light of that objective of Directive 95/46 and of the wording of Article 4(1)(a), it must be held that the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out 'in the context of the activities' of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable'*.³

Since the Data Protection Directive did not provide for a 'targeting criterion' (market location principle), the CJEU had to use a 'detour' in order to argue for

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<http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=6383062>, para. 54 ff.

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the applicability of European data protection law. With the GDPR, however, such a detour is no longer necessary, because Article 3(2) GDPR can and should be directly applied.

This is because the establishment criterion set out in Article 3(1) GDPR is supplemented by Article 3(2) GDPR, which introduces a market location principle foreign to the Data Protection Directive. This significantly expands the territorial scope of application of European data protection law compared to the previous legal situation. If, as in the example case, goods or services are offered to persons in the Union, the GDPR applies via Article 3(2).

The explanations on page 6 therefore seem to overstretch the scope of application of Article 3(1) GDPR. The EDPB is of the opinion that, for the purpose of Article 3(1) GDPR, the meaning of ‘processing within the scope of the activity’ is to be understood in the light of the relevant case law. In order to achieve the objective of ensuring effective and complete protection, the meaning ‘within the scope of the activity’ could not be interpreted restrictively. On the other hand, it should not be interpreted too broadly in order to avoid the conclusion that any presence in the EU opens up the scope of application. Contrary to this, the EDPB again states, with reference to the Google-Spain decision, that the activities of a local establishment in a Member State and the data processing activities of a data controller or processor established outside the EU are inextricably linked and may thus trigger the applicability of the GDPR, even if that local establishment does not play a role in data processing.

This view would mean that Article 3(2) GDPR would be obsolete. If it were not applicable in this case, the question would arise under which conditions it could be considered at all. It does not correspond to the GDPR system that Article 3(1) GDPR acquires such a broad scope of application, as this is no longer necessary at all on the basis of Article 3(2) GDPR. Furthermore, it cannot be in accordance with the spirit and purpose of the GDPR that it applies even if no processing as such takes place in a local branch, but only if the company outside the EU which is entrusted with data processing is linked to a local branch.

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We also note that for processors, however, the jurisprudence is not necessarily fully transferable, as the Data Protection Directive did not consider the processor as a relevant factor for territorial applicability. This is important to take into consideration as the scope of the ‘context of the activities of an establishment of a processor’ in which processing may happen, is by definition much narrower than the breadth that ‘context of the activities of an establishment of a controller’ can take, since the processor’s relevant context of activities will be determined by the agreement pursuant to Article 28(3) and the controller’s instructions. We would welcome if the guidelines pointed this out and maybe added an example to make this clear.

We also welcome the recognition that the criteria ‘in the context of the activities of’ 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.’

Example 2 should 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 is in scope (including, for example, the processing of Chinese employees located in China).

5. Example 3 (page 7)

Example 3 also aims at a possible application of Article 3(1) GDPR.

In this case, a hotel and resort chain in South Africa offers package deals via its website which are available in English, German, French and Spanish. The company has no offices or representatives in the EU. It is consequently concluded that there is therefore no establishment within the EU within the meaning of the

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GDPR, so that the processing operations concerned do not open up the scope of application of the GDPR pursuant to Article 3(1) GDPR.

The following example then addresses the problem of whether Article 3(2) GDPR could be applied. However, instead of giving detailed answers, it is merely stated in general terms that this requires a concrete analysis in each individual case. Unfortunately, the question of application of the GDPR via Article 3(2) GDPR in such a case remains unanswered.

It would therefore be welcome if the EDPB could provide clarification by, for example, providing guidance on which cornerstones or criteria can be used to determine whether Article 3(2) GDPR applies. The fact that a website is available in different languages does not seem to be sufficient in itself to assume a connection with the offering of goods to persons concerned. Although the EDPB gives some examples of when to consider offering goods or services to a data subject in the EU⁴, a reference is made to the case law under the Data Protection Directive. However, such a transfer of case law should be reconsidered (see above). In addition, the EDPB states that in these examples, too, 'in concreto' coordination with the individual case is always required and that in some cases only a combination of the examples opens up the scope of application. Unfortunately, these explanations are too imprecise and broad. They raise new questions instead of formulating solutions and clear guidance. Further statements by the EDPB are preferable here in order to eliminate legal uncertainty. In our view, the Guidance should refer to Recital 23, define further criteria and refer to previous case law only where a transfer to the new provisions is possible.

6. Example 4 and 6 (page 6 and 10)

Example 4 should also reflect that the GDPR - and the rights it protects and the obligations it imposes - is not borderless. While the EDPB notes in paragraph 2

⁴ See page 15.

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that ‘the place of processing is not relevant’, in Example 4 it considers that the GDPR applies without limitation only because the processing is carried out by the data controller established in the Union, even if the service is ‘exclusively addressed’ to customers outside the EU and the service itself is ‘only available in those three countries’.

Bitkom welcomes the clarification that the applicability of the GDPR will be assessed separately for the 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.’

However, the wording of the Guidelines in section i) (‘Processing by a controller in the EU using a processor not subject to the GDPR’) is somewhat confusing in this regard. The EDPB seems to suggest that the controller, who is subject to the GDPR, has to ensure that the processor, who is not subject to the GDPR directly, complies with a processor’s obligations under the GDPR as such. The Guidelines should make it clearer that the conclusion of an agreement in compliance with Article 28(3) is sufficient in this regard.

Example 6 should thus clarify that only to the extent the GDPR applies to the Finish research institute that it needs to put such contractual requirements in place, as the way it is phrased (i.e. processing that only concerns Sami people in Russia, the processor is based in Canada) can be read in a way that implies the application of the law simply because the research institute is ‘Finnish’.

7. Obligations of the Processor

Regarding the obligations of the processor, certain clarifications would be appreciated and distinction with regard to the different spheres of responsibility

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made. The 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. The GDPR limits its own scope by dropping the former equipment criterion and now includes certain, specific obligations for processors. With that the EU legislator chose to put only limited obligations on controllers not subject to EU law.

The Guidelines list GDPR obligations that the processor will still be subject to, but acknowledges limits to only a few articles when it comes to 'non-EU' controllers (see Article 28(2), (3), (4) and (6) on the duty to enter into a data processing).

The challenge in scenarios where the processor is subject to the GDPR and the controller is not, is that the processor needs to comply with GDPR rules but needs the controller's cooperation to do it, whereas the controller is not subject to the GDPR (but to its own law) and will be reluctant to follow the GDPR rules simply because he selected a processor in the EU. This will make such processors unattractive for the non-EEA market.

This leads to the following:

- EEA-processors should only be obliged to meet requirements to the extent they are in their sphere and control (eg. TOMs) and do not require the non-EEA controller's cooperation (eg. signing a DPA and European Union Model Clauses (EUMC)).
- An additional argument for not needing EUMCs when sending non-EEA data back to the non-EEA controller is the fact that this restores the former state (non-EEA data is with the non-EEA controller). Thus, no transfer mechanisms should be needed for EEA Processors sending back data to non-EEA Controllers.

We believe that some of the processor obligations should therefore be modified when the controller is a 'non-EU' one. For example:

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- A 'non-EU' controller may also not be regarded as a controller in scope of records of processing under Article 30 (2). 'Non-EU' controllers not subject to the GDPR are likely to object to their identity being potentially disclosed under Article 30(4) GDPR.
- The fact that the controller who is collecting the data outside the scope of GDPR (with the help of a processor in scope of GDPR) is in a third country calls into question whether a GDPR-transfer into a third country is even occurring. Even if a transfer occurs, the facts of this scenario make the applicability of some of the derogations under Article 49(1) GDPR highly likely.
- On page 11, the Guidelines also imply that the processor should evaluate instructions in light of the GDPR, even in the case of controllers otherwise not subject to the GDPR. Processors are not and should not be considered to be as enforcement bodies of EU law or of broader ethical principles.

It may not be practical for the Guidelines to list all such modifications. In that case the Guidelines should revert to an abstract statement whereby many of a processors obligations will be modified in case of processing for a non-EU controller and maybe list a few examples where this will be the case.

Furthermore, we suggest including examples for situations where a non-EU processor offers services to a EU-controller (not to data subjects).

Such an example could be: A Switzerland based data processor offers a cloud based customer relationship management system (CRM-system) to companies located in the European Union. Within the CRM system personal data of EU based contact persons at customers of the companies are stored (Article 3(2)a GDPR does not apply). The CRM system is offered to companies acting as controller, but not to data subjects. Accordingly, the processor should not be in the material scope of the GDPR.

8. Targeting Criterion (f.i. example 9)

Bitkom welcomes the clear guidance around the application of Article 3(2)(a) emphasizing 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. To this end, the demonstrable ‘intention’ of the controller or processor to offer goods or a service to a data subject located in the Union is indeed necessary and we welcome such clarification. We find Example 14 enlightening in this respect.

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 should be also included under the next sections on the other aspect of Article 3(2). This would help address some of the unpredictability of movements of the data subject into and out of the Union. However, the guidance should also explicitly acknowledge that unpredictability from the perspective of the controller (and the processor).

Example 9 should also be clarified to say that if the ‘app is exclusively directed at the U.S. market’, then the targeting criteria will obviously not bring the app within the scope of the GDPR, even if the data subject is in Europe. The GDPR, the EU acquis as well as the jurisprudence makes it clear that the mere accessibility of a service is not enough to trigger the legal obligations. This clarification should also be included under this section.

Furthermore, we would appreciate guidance on the European level as to when national laws should be applied, as this was implemented differently in the Member States. For instance, at the moment there is no clarity on whether the German *Bundesdatenschutzgesetz* applies in cases where a targeting company based outside the EU uses data from minors (German citizens on the one hand, EU-citizens on the other hand).

9. Offering of Goods of Services (f.i. Example 12)

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

However, we would like to see more consistency across the Guidelines to ensure that all the criteria for application with regard to the GDPRs' territorial 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 Guidelines themselves are clear that only the activity directed at the data subject in Europe should be.

10. Monitoring of Data Subjects' Behaviour

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

In this context Example 15 describes the application of Article 3(2) GDPR in which a marketing company based in the USA advises a French shopping centre on the analysis of customer movements collected by WLAN-tracking.

Ultimately, neither this nor other examples answer the question of what the consequence is if neither 'goods or services' are offered nor 'monitoring of behaviour' takes place. An example: The opinion poll of an US-American company without a branch in the EU conducts surveys on a marketplace in Germany.

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According to its wording, Article 3(2) GDPR should not apply here as no 'monitoring' takes place. It would be helpful if the EDPB clarified that in such circumstances Article 3(2) GDPR cannot be applied.

Furthermore, guidance on the scope of the criterion would be highly appreciated as there are no clear criteria at the moment as to what constitutes 'monitoring'. For instance, is it necessary to monitor the behaviour over a certain amount of time (if so, how long does the period have to be), when does monitoring begin exactly and which criteria, duration, intensity is needed? We therefore suggest that the EPPB includes criteria and examples that help controllers determine whether the processing constitutes monitoring.

Moreover, guidance on how controllers should assess whether data subjects reside in the EU is also missing in the Guidelines. This determination, however, is crucial as it may trigger the GDPR application. Examples on this question would improve legal certainty in this regard.

11. Example 20 (page 22)

Example 20 links the question of the territorial scope of application with the obligation to appoint a representative pursuant to Article 27 GDPR.

For this purpose, the EDPB describes an Indian pharmaceutical company that is not domiciled in the EU but falls within the scope of Article 3(2) GDPR. This company sponsors clinical studies carried out by researchers (hospitals) in Belgium, Luxembourg and the Netherlands.

In this case, a fundamental clarification is needed as to whether clinical trials are to be regarded as 'services', what the service provided consists of and by whom it is provided. In this context, it would also useful to explain the relationship between the pharmaceutical company and the researchers (hospitals).

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12. Examples 12 and 15 (pages 16 and 18)

The examples 8 to 16 deal with the scope of application of Article 3(2) GDPR. However, in this category only the two examples 12 and 15 go one step further and refer to Article 27 GDPR. This may result in uncertainties compared to the other examples. This gives the impression that only in these two cases a representative would have to be appointed in the Union.

However, this contradicts the explanations of the EDPB (‘The GDPR imposes an obligation to designate a representative in the Union to any controller or processor falling under the scope of Article 3(2), unless they meet the exemption criteria as per Article 27(2)’, p. 19 f.). Article 27(1) GDPR provides that in cases pursuant to Article 3(2) GDPR, the responsible party or the processor must nominate a representative in the Union in writing, unless an exception pursuant to Article 27(2) GDPR applies.

It is therefore proposed that examples 8 to 16 should be amended in a uniform manner so that either all refer to Article 27 GDPR or a reference to Article 27 is omitted altogether.

13. Representatives’ Obligations and Liability

On page 23 the EDPB refers to the representatives’ obligations and its liability. The EDPB states that in line with Recital 80 and Article 27(5), the designation of a representative in the Union does not affect the responsibility and liability of the controller or of the processor under the GDPR and shall be without prejudice to legal actions which could be initiated against the controller or the processor themselves. We agree with that statement and welcome the clarification. However, in the following section the EDPB argues that 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 and that to this end, it was the intention to enable enforcers to initiate enforcement action against a representative in the same way as against

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controllers or processors. This should, in the view of the EDPB, include the possibility to impose administrative fines and penalties, and to hold representatives liable. Such a liability would greatly influence upcoming business models where the representatives' services are offered to controllers outside of the European Union as such a risk would render these services unviable. With reference to Recital 80 and Article 27(5) GDPR the liability must remain with the controller and it should be the representatives' task to ensure that enforcement can take place but not in a way where they would see the sanctions imposed on themselves. We would therefore welcome an amendment to that section.

Bitkom represents more than 2,600 companies of the digital economy, including 1,800 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.