AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

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

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2017, directly supports more than 4.7 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Introduction

The American Chamber of Commerce to the European Union (AmCham EU) brings together US companies invested in Europe from a broad range of sectors. AmCham EU members are global companies with a strong presence both in Europe and the United States.

When formulating guidance and rules on data protection and other issues, we encourage regulators to consult regularly and work closely with stakeholders, including industry. AmCham EU therefore particularly welcomes the opportunity granted by the European Data Protection Board (EDPB) to comment on the Draft Guidelines on the territorial scope of the GDPR (hereafter the 'Draft Guidelines'), which are subject to public consultation.

For members of AmCham EU, operating on both sides of the Atlantic, understanding the territorial scope of the application of GDPR is an essential element for proper GDPR compliance. As such, the Draft Guidelines are a long-awaited document.

AmCham EU commends the EDPB for answering some key questions faced by companies with activities both inside and outside the EU. This is required to help determine the part of their non-EU activities subject to the GDPR. However, the following points of the Draft Guidelines would benefit from further consideration and adaptations, and in particular how the positions taken in the Draft Guidelines impact companies' operations in practice. These points are:

- The need for a counter-example of a non-EU company with EU subsidiaries that do not trigger the application of the GDPR to the group's non-EU entities;
- The extent to which EU-based processors must comply with the international data transfer rules (Chapter V of the GDPR) when processing non-EU personal data on behalf of non-EU controllers, and the tools to do so in practice;
- The application of the 'targeting' criterion in circumstances where EU personal data is processed by non-EU processors; and
- The interpretation of the concept of 'monitoring' when it is performed on a global (ie, non-EU specific) scale.

Non-application of the GDPR to non-EU headquartered groups with EU establishments (p. 6-7)

AmCham EU welcomes the examples included in the Draft Guidelines to illustrate (i) a case where an EU establishment triggers the application of the GDPR (Example 2), and (ii) a case where an establishment is absent in the EU, the GDPR is not triggered (Example 3). AmCham EU strongly encourages the EDPB to consider adding in the Draft Guidelines **an example of a case where a non-EU headquartered multinational, which has subsidiaries in the EU, does not trigger the application of the GDPR to its entities outside of the EU**, as it is obvious that the mere fact that a non-EU parent company has an establishment in the EU does not make the data processing activities of that parent company automatically subject to the GDPR.

Such an example would have the double benefit of addressing a situation faced by many multinationals and illustrating a concrete case when the EDPB considers that a processing activity is too remote to be considered as occurring 'in the context of' the activities of an EU establishment.

A possible example could be as follows:

- An industrial conglomerate with headquarters in the US operates in the European Union through subsidiaries, each with their own manufacturing, sales and marketing operations in various business lines. Each subsidiary takes its own decisions regarding the personal data it processes as part of its activities. The headquarters in the US processes personal data about the shareholders and potential

investors in the conglomerate as a whole (not the individual business lines). Some of these shareholders and potential investors may be EU-based individuals but are not targeted by the US headquarters in the sense of Article 3.2 GDPR.

Our view is that the personal data processing being carried out by the US headquarters is sufficiently remote to consider that they are not occurring 'in the context of' the activities of the EU subsidiaries, and therefore should not be subject to the GDPR. We call on the EDPB to clarify this position and include it in the final version of the guidelines.

EU processors and non-EU controllers (p. 11-12)

The Draft Guidelines of the EDPB state that a processor in the EU is subject to the GDPR provisions that are directly applicable to processors, even if it processes personal data for a controller established outside the EU (not located in an adequate jurisdiction). AmCham EU understands this position, which could follow from the fact that the processing is carried out in the context of the activities of an establishment of a processor in the EU (Article 3(1)).

The Draft Guidelines go on to state that, as a consequence, the processor must among others respect the provisions on transfers of personal data to third countries as per Chapter V of the GDPR. However, to the extent that this should be the case, neither the GDPR nor the guidelines provide a transfer solution enabling data processed by an EU processor to be legally transferred back to such non-EU controllers.

The Standard Contractual Clauses adopted by the European Commission under the Directive 95/46 as they currently stand indeed do not offer a suitable solution, as these clauses require the involvement of at least one EU-based controller.

The other derogations of GDPR Article 49 do not offer an appropriate solution either, considering they cannot be relied upon for structural transfers (following the guidelines of the WP29 to the extent they remain applicable), and that contractual necessity can only be relied upon when this contract is with the data subjects themselves (Article 49.1 (b)) or is concluded in the data subject's interest (Article 49.1 (c)). It is therefore only workable in a business-to-consumer context.

The acknowledgment that transfers by EU processors to non-EU controllers must occur in compliance with the GDPR transfer rules combined with the EDPB's silence on how this can be achieved in practice, is detrimental for both EU service providers and their non-EU customers.

For transfers from EU processors to non-EU controllers in particular, the challenge is indeed that the EU processor needs to comply with GDPR rules, but also needs the non-EU controller's cooperation to do it. Whereas the non-EU controller is not subject to GDPR (but to its own law) and will be reluctant to follow the GDPR rule simply because it selected a processor in the EU. This will make EU processors unattractive for the non-EU markets.

AmCham EU commends the EDPB for recognising from the outset that EU processors will face challenges with obligations 'relating to the assistance to the data controller in complying with its (the controller's) own obligations under the GDPR'. This statement however, among other, creates uncertainty about the exact content of a data processing agreement to be concluded between an EU-processor and non-EU controller (not subject to the GDPR) in application of Article 28(3). We understand the EDPB's statement above as meaning that such an agreement would not need to contain Article 28(3) (e) and (f) (assisting the controller with requests for the exercising of rights and compliance with Articles 32 to 36, respectively), but would welcome a clarification of the EDPB on the exact impact on the content of data processing agreements.

The EDPB should take a position and offer (at least interim) solutions on how to handle this important gap in the law. Possible (interim) solutions could be:

- Consider that an EU processor should only be obliged to meet the GDPR's requirements to the extent it is able to do so independently, ie, without involvement of the non-EU controller;

- Recognise that the data is theoretically not being 'transferred to' a third country as it originates from there in the first place (having been originally collected by the non-EU controller); or

- Accept that in such circumstances an existing set of standard contractual clauses could be relied upon (with or without certain amendments); for example by (a) considering that the EU-based processor (or another third party) can act as the representative of the non-EU controller, and (b) advising the signing of the controller-to-controller clauses between, on the one hand, the EU processor (acting as representative of the non-EU controller), and on the other, the non-EU controller.

The EDPB should draw the attention of the European Commission to this significant issue for the development of digitalisation in the EU and invite the European Commission to design appropriate standard contractual clauses enabling processors in the EU to transfer data to controllers outside the EU as a matter of urgency. Considering that the obligation to appoint a representative is only relevant for companies actually subject to the GDPR under Article 3.2, the above third option would also require an acknowledgment that a company can voluntarily designate such a representative.

Targeting criterion (p. 15)

AmCham EU welcomes the clear guidance around the application of Article 3(2)a emphasising 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 services to a data subject located in the Union is necessary. We find example 14 enlightening in this respect.

However, **an additional clarification would be much appreciated where the EDPB considers that there needs to be a connection between the processing activity and the offering of a good or service, but then further specifies that both direct and indirect connections are relevant and to be taken into account**. It would be particularly helpful to be provided with some examples of how 'indirect' connections may be applicable in the case of a processor.

Monitoring of data subjects' behaviour (p. 17-18)

We would welcome **more guidance on the nature of the processing activity which can be considered as 'behavioural monitoring'**. In particular, the following statement would benefit from 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' (page 18).

Companies may analyse customer behaviour from its global customer base (including EU personal data but without looking for any EU-specific outcome) for marketing or strategic decision-making. However, the Draft Guidelines only include examples where the individuals are specifically 'targeted' with the type of monitoring examined. Our understanding is therefore that the type of activity described here should be excluded, but we would welcome a confirmation of our understanding.