

Comments

Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR

Recommendation 1-Change the word 'interplay' to 'correlation' in the heading

Dictionary meaning

- Interplay-the ways in which two or more things, groups, etc., affect each other when they happen or exist together-More suitable for people
- Correlation-a mutual relationship or connection between two or more things.-More generic

Recommendation 2-Introduction-Para1

Since the heading starts with Article 3 of GDPR, it is appropriate that the Introduction also explains in brief Article 3 at first. You could say as introduction Para 1 as follows

1. According to Article 3 of GDPR, (territorial Scope) This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not

Recommendation 3-Introduction-Para 4

Change the word 'interplay' to 'correlation'

Recommendation 4-Introduction-Para 4

This is a very long sentence and may be confusing (in fact there are many such long sentences in GDPR itself-Example Recital 29!). Change as follows

The following sections aim at clarifying this correlation between Article 3 and the provisions of the GDPR on international transfers in Chapter V . It aims to assist controllers and processors in the EU in identifying whether a processing constitutes a transfer to a third country or to an international organisation. As a result, they can determine the need to comply with the provisions of Chapter V of the GDPR.

Recommendation 5-Para 8

This states' It is useful to recall here that pursuant to Article 3, the application of the GDPR must always be assessed in relation to a certain processing rather than with regard to a specific entity (e.g. a company)'. It refers to Sections 1–3 of the EDPB Guidelines 3/2018 on the territorial scope of the GDPR (Article 3).

This sentence can be replaced as 'It is useful to recall here that pursuant to Article 3, the application of the GDPR must always be assessed in relation to a certain processing rather than with regard to a specific entity (e.g. a company).Article 3 of GDPR refers to 'context of the activities of an establishment ' 8

Recommendation 6-Para 11-Third Sentence

It should, inter alia, be kept in mind that the concepts of controller, joint controller and processor are functional concepts in that they aim to allocate responsibilities according to the actual roles of the

parties and autonomous concepts in the sense that they should be interpreted mainly according to EU data protection law.

This is confusing. Not clear as to what it conveys. Especially the phrase 'autonomous concepts'. This can be made simpler and easy to understand

Recommendation 7- Para 12 and Example 1

Out of the lot, this is most confusing especially when read in conjunction with 'Guidelines 3/2018 on the territorial scope of the GDPR'. Certain basics are important here

Article 3 (2) (a) of GDPR states that 'This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to the *offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union*'

Let us look at example 3 cited at Guidelines 3/2018

Example 3: A hotel and resort chain in South Africa offers package deals through its website, available in English, German, French and Spanish. The company does not have any office, representation or stable arrangement in the EU. In this case, in the absence of any representation or stable arrangement of the hotel and resort chain within the territory of the Union, it appears that no entity linked to this data controller in South Africa can qualify as an establishment in the EU within the meaning of the GDPR. Therefore the processing at stake cannot be subject to the provisions of the GDPR, as per Article 3(1). However, it must be analysed in concreto whether the processing carried out by this data controller established outside the EU can be subject to the GDPR, as per Article 3(2) (*Does the hotel resort offer services to a data subject in the EU?*)

Let us look at Example 1 cited at the draft guidelines

Example 1-Maria, living in Italy, inserts her personal data by filling a form on an online clothing website in order to complete her order and receive the dress she bought online at her residence in Rome. The online clothing website is operated by a company established in Singapore with no presence in the EU. In this case, the data subject (Maria) passes her personal data to the Singaporean company, but this does not constitute a transfer of personal data since the data are not passed by an exporter (controller or processor), since they are passed directly and on her own initiative by the data subject herself. Thus Chapter V does not apply to this case. Nevertheless, the Singaporean company will need to check whether its processing operations are subject to the GDPR pursuant to Article 3(2).12 (*Does the on line clothing store offer goods to a data subject in the EU?*)

Let us look at Recital 23 'Applicable to Controllers/Processors Not Established in the Union if Data Subjects Within the Union are Targeted'. Specifically 'Whereas the mere accessibility of the controller's, processor's or an intermediary's website in the Union, of an email address or of other contact details, or the use of a language generally used in the third country where the controller is established, is insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union. (*Isn't the South African/Singapore controller taking money from the EU data subject?*)

Let us look at this sentence under 'targeting criterion' (Guidelines 3/2018) 'In addition to being applicable only to processing by a controller or processor not established in the Union, the targeting criterion largely focuses on what the "processing activities" are "related to", which is to be considered

on a case-by case basis. Further it explains that that 'When taking into account the specific facts of the case, the following factors could therefore inter alia be taken into consideration, possibly in combination with one another:

The EU or at least one Member State is designated by name with reference to the good or service offered;

- The mention of dedicated addresses or phone numbers to be reached from an EU country;
- The mention of an international clientele composed of customers domiciled in various EU Member States, in particular by presentation of accounts written by such customers
- The use of a language or a currency other than that generally used in the trader's country, especially a language or currency of one or more EU Member states;
- The data controller offers the delivery of goods in EU Member States

(Isn't the South African/Singapore controller covered by these factors?)

(italics mine)

I think most countries are confused with this. Despite extensive explanation in Guidelines 3/2018 on 'targeting criterion' this is not clear. If we shift example 3 of Guidelines 3/2018 or Example 1 of this draft guidelines and shift it to 'Targeting criterion' in Guidelines 3/2018, we will see that it is covered by GDPR!

I recommend that this whole clause/example be removed from this draft guidelines. I do believe that there is a clear conflict between GDPR Article 3(2) and the EDBP Guidelines. IMHO there is a need to change GDPR Article 3 (2) and / or Guidelines 3/2018

Distribution of data across more than one data center.

This is not specific to this draft guidelines. However, this needs to be perhaps addressed by Guidelines 3/2018. If there is personal data processed across two data centres (one in EU and another outside EU) how will GDPR/Territorial criterion be applicable? Even more specifically, if parts of data are split between data centres, can a processor/controller claim that his data was not in the EU and hence territorial criterion does not apply?

Ramesh Venkata Ramani
Datamatters FZCO
Dubai
United Arab Emirates
21 December 2021
Cdr.ramani@gmail.com