

# LEGALFOXES LAW TIMES

## ANALYSIS OF ARTICLE 3(2) OF GENERAL DATA PROTECTION REGULATION ON THE GUIDELINES ADOPTED ON NOVEMBER 2018-

By – k. methirai

Article 3 provides for the territorial scope for application of General Data Protection Regulation (“GDPR”) regulation on European Union (“EU”) establishments as well as non-EU establishments.

According to Article 3(2), which states: *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:*

1. *the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or*
2. *the monitoring of their behaviour as far as their behaviour takes place within the Union.*<sup>1</sup>

This sub-regulation provides for the extra-territorial jurisdiction of GDPR over non-EU establishments processing personal data of data subjects in the Union. This sub-regulation provides two condition inferred from the Article which must be satisfied for the application of GDPR compliances on non-EU companies/establishments. These are: 1) The data subjects must be in Union at the time of processing of their data by data controller/processor. 2) The processing activities are related to the offering of goods or services to such data subjects in the Union *or* monitoring of their behavior as far as their behavior taking place within the Union.

If these two conditions are satisfied, then GDPR must be complied with.

“Data subjects must be in Union at the time of processing of their data”-

The data subjects under this Article is wide enough to include even the residents of EU and not only the citizens. This provision of the GDPR reflects EU primary law which also lays down a broad scope for the protection of personal data, not limited to EU citizens, with Article 8 of the Charter of Fundamental Rights providing that the right to the protection of personal data is not limited but is for “everyone”.<sup>2</sup>

---

<sup>1</sup><https://gdpr-info.eu/art-3-gdpr/>.

<sup>2</sup> Charter of Fundamental Right of the European Union, Article 8(1), « Everyone has the right to the protection of personal data concerning him or her”.

However, the ambiguity arises regarding the satisfaction of the second condition, especially for a company which already collected data when there was non-compliance of GDPR, but after the data subject has shifted to EU, there is a question of compliance and the extent of its application to such data controller. Now under the second condition, one of the two criteria must be satisfied, in essence, the processing activities are related to the *offering of goods or services* to such data subjects in the Union *or monitoring of their behavior* as far as their behavior taking place within the Union.

“Offering of goods or services”-

According to the Recitals<sup>3</sup> of GDPR, in order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union. Processing activities which are “related” to the activity which triggered application of Article 3(2) also fall within the territorial scope of the GDPR. The EDPB considers that there needs to be a connection between the processing activity and the offering of good or service, but both direct and indirect connections are relevant and to be taken into account.<sup>4</sup>

The word “envisages” provides for an interpretation that the present context is dependent on the conduct of the data controller that shows his intention to offer goods or services to the data subject in the Union. In order for a better understanding of the term “envisage” and the intention of the data controller under this Article, the EDPB deems this case law in *Pammer v Reederei Karl Schlüter GmbH & Co*<sup>5</sup> and *Hotel Alpenhof v Heller* (Joined cases C-585/08 and C-144/09)<sup>6</sup> might be of assistance when considering whether goods or services are offered to a data subject in the Union. 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 data controller or processor pays a search engine operator for an internet referencing service in order to facilitate access to its site by consumers in the Union; or the controller or processor has launched marketing and advertisement campaigns directed at an EU country audience
- The international nature of the activity at issue, such as certain tourist activities;

<sup>3</sup> Recital 23 of GDPR. See <https://gdpr-info.eu/recitals/no-23/>.

<sup>4</sup> [https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_guidelines\\_3\\_2018\\_territorial\\_scope\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_3_2018_territorial_scope_en.pdf).

<sup>5</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:62008CC0585>. (para 76-90).

<sup>6</sup> It is all the more relevant that, under Article 6 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in absence of choice of law, this criterion of “directing activity” to the country of the consumer’s habitual residence is taken into account to designate the law of the consumer’s habitual residence as the law applicable to the contract. Supra

- The mention of dedicated addresses or phone numbers to be reached from an EU country;

The use of a top-level domain name other than that of the third country in which the controller or processor is established, for example “.de”, or the use of neutral top-level domain names such as “.eu”;

- The description of travel instructions from one or more other EU Member States to the place where the service is provided;

- 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.

As already mentioned, several of the elements listed above, if taken alone may not amount to a clear indication of the intention of a data controller to offer goods or services to data subjects in the Union, however, they should each be taken into account in any *in concreto* analysis in order to determine whether the combination of factors relating to the data controller’s commercial activities can together be considered as an offer of goods or services directed at data subjects in the Union.

#### *Monitoring of their behavior as far as their behavior taking place within the Union-*

According to this criterion, the behavior monitored must be of the data subject and that the monitored behavior must take place within the territory of the Union. “Monitoring” specifically includes the tracking of individuals online to create profiles, including where this is used to take decisions to analyse/predict personal preferences, behaviours and attitudes.<sup>7</sup> However, any online collection or analysis of personal data of individuals in the EU does not necessarily count as monitoring. It depends on the controller’s intention to target and collect data for a specific purpose and any subsequent behavioral analysis or profiling activity, such as behavioral advertising, or geolocation services for marketing purposes.<sup>8</sup>

In order to understand what constitutes “monitoring of behavior”, reference is made to the recitals of GDPR which states : “*in order to determine whether a processing activity can be considered to monitor the behaviour of data subjects, it should be ascertained whether natural persons are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences,*

---

<sup>7</sup>[https://www.twobirds.com/~/\\_media/pdfs/gdpr-pdfs/11--guide-to-the-gdpr--material-and-territorial-scope.pdf?la=en](https://www.twobirds.com/~/_media/pdfs/gdpr-pdfs/11--guide-to-the-gdpr--material-and-territorial-scope.pdf?la=en).

<sup>8</sup><https://blogs.dlapiper.com/privacymatters/eu-new-edpb-guidelines-on-the-territorial-scope-of-the-gdpr/>.

*behaviours and attitudes.*"<sup>9</sup> The inference drawn in addition is that The Guidelines explain that with respect to monitoring, unlike the offering of goods and services consideration, there is no requisite "intention to target." However, "monitoring" implies that the controller must have a "specific purpose in mind for the collection and subsequent reuse of the relevant data about an individual's behavior in the EU."<sup>10</sup>

Thus, the application of Article 3(2)(b) where a data controller or processor monitors the behavior of data subjects who are in the Union could therefore encompass a broad range of monitoring activities, non-exhaustive including in particular: - Behavioural advertisement

- Geo-localization activities, in particular for marketing purposes

- Online tracking through the use of cookies or other tracking techniques such as fingerprinting

- Personalized diet and health analytics services online

- CCTV - Market surveys and other behavioural studies based on individual profiles - Monitoring or regular reporting on an individual's health status

The aforesaid considerations and factors are wholly based on the **Guidelines 3/2018 on the territorial scope of the European Union's ("EU") General Data Protection Regulation ("GDPR")**<sup>11</sup>

Analyzing the GDPR by way of following situations where the activities of the Controller would attract the application of the GDPR-

1) When Controller continue to store the data even though when it was collected, there was no compliance with the GDPR-

2) When Controller contact the data subject for completion of a contract that was commenced outside the EU

3) Controller send marketing mails to the data subject based on consent that was collected when he was not in the EU

In the *first case*, the personal data will become part of the filing system of the controller. According to Article 2, which provides that GDPR applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system. It is clear that there is no compliance of GDPR for just storage of data apart from security of the data under Article 32, unless the data in the filing system is processed as given under Article 3 of

---

<sup>9</sup> Recital 24 of GDPR <https://gdpr-info.eu/recitals/no-24/>.

<sup>10</sup> id at 4.

<sup>11</sup> id at 4.

GDPR. Thus, regardless of when it was collected, after the GDPR application, the data subject has certain rights towards the data stored and retained by the Controller, such the right to be forgotten or right to object or the right to be informed also includes information about the duration of storage.

In the *second case*, according to the Recital 15 of GDPR, it provides for the protection of natural persons should apply to the processing of personal data by automated means, as well as to manual processing, if the personal data are contained or are intended to be contained in a filing system. Furthermore, according to the **Guidelines 3/2018 on the territorial scope of the European Union's ("EU") General Data Protection Regulation ("GDPR")**<sup>12</sup> objectively provides that once the data subject is protected under the ambit of the Regulation by his place of residence and that it is clear that the intention of the controller is to offer good or services, GDPR needs to be complied, especially Article 5 be complied thereto.

In the *third case*, assuming that the data subject was an existing customer of data controller before the GDPR compliances, then after it is brought under the ambit of GDPR, e-mail marketing is allowed without consent. Recital 47 of the General Data Protection Regulation expressly states that the law also applies to the processing of personal data for direct marketing as a legitimate interest of the controller.

In addition, such an interest could be seen, for example, if there is a relevant and proportionate relationship between the data subject and the controller. This could be the case if the data subject is a customer of the controller or is in the latter's service. Therefore, much indicates that e-mail marketing is allowed without consent, at least for existing customers. If the company has a justified interest in 'cold' calling through e-mail marketing, the marketing e-mails may be sent to potential customers without consent. To receive no further information by newsletter or e-mail, the customer receiving them need only object to processing for marketing purposes. According to Art. 21(2), (3) GDPR the data subject always has the right to object the processing of personal data for direct marketing purposes. If the data subject objects, the controller only has to stop the processing for marketing purposes, but can still process the data for other purposes, e.g. for the performance of a contract. The legitimate interest of the controller to process data for marketing purposes can never outweigh the objection of the data subject. Regardless of whether a company bases its marketing measures afterwards on its legitimate interest or on consent, the controller has to adhere to the data subject's right to be informed. The content of said information depends on which justification reason is used.<sup>13</sup>

---

<sup>12</sup> id at4.

<sup>13</sup><https://gdpr-info.eu/issues/email-marketing/>.