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## EBF response to the EDPB draft guidelines on the territorial scope of the GDPR

### Key points:

- ◆ The EBF welcomes the opportunity to provide a response to the European Data Protection Board's consultation on the draft guidelines on the territorial scope of the General Data Protection Regulation.
- ◆ The EBF welcomes the clarifications provided by the EDPB in the guidelines, notably that the GDPR does not apply to the same extent either to a controller or a processor located outside of the European Union and 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"*.
- ◆ However, we would welcome some clarifications, notably with regards to the examples provided in the draft Guidelines by the EDPB. In order to fully achieve their goal of providing guidance to stakeholders, we would welcome examples describing more ambiguous situations with further explanation of how the EDPB reaches its conclusions.
- ◆ The EBF notes that further alignment of the draft guidelines with the GDPR is needed with regards to the question of scope. We would thus like to encourage the EDPB to avoid going beyond the requirements provided for by the GDPR.

### EBF position:

The European Banking Federation (EBF) welcomes the European Data Protection Board (hereafter 'EDPB') draft guidelines on the territorial scope of the General Data Protection Regulation (GDPR) and the opportunity to respond to this consultation.

You will find below some general and some technical comments on the draft guidelines.

#### **1. Clarifications on the examples**

The EBF welcomes the use of examples by the EDPB in order to clarify the territorial scope of the GDPR.

However, we would welcome further details in the examples provided, notably presenting the rationale of the EDPB and the criteria taken into account to reach its conclusions.

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Furthermore, in several occasions, we would welcome additional examples that explain more ambiguous situations.

For instance, the first three examples of the guidelines relate to cases where it seems pretty clear that article 3(1) or 3(2) apply. The first example is also very similar to the Google Spain case. Therefore, it would be advisable if the EDPB provided some further examples, where the inextricable link between the activities of an EU establishment and the processing of data carried out by a non-EU controller is not as evident.

Furthermore, we would suggest some amendments to the part "Consideration 1: data subjects in the Union" (page 13-14) in order to ensure consistency with the GDPR. This would include some amendments to the examples, including further details on how the EBDP reaches its conclusions and which criteria it considers, as well as the following:

**EBF suggestion for amendment:**

*"The EDPB also wishes to underline that the fact of processing personal data of an individual **who is** in the Union alone is not sufficient to trigger the application of the GDPR to processing activities of a controller or processor not established in the Union. The element of "targeting" individuals in the EU, either by offering goods or services to them or by monitoring their behaviour (as further clarified below), must always be present in addition.*

*(...)*

*Moreover, it should be noted that the processing of personal data of EU ~~citizens or~~ residents that takes place in a third country **does not only** triggers the application of the GDPR, **as long as if** the processing is **not** related to a specific offer directed at individuals in the EU or to a monitoring of their behaviour in the Union."*

EDPB Draft Guidelines on the territorial scope of the GDPR, page 8.

**Specific focus on employees' data:**

The EBF observes that there might be uncertainty with regards to the applicability of the GDPR to the processing of data of employees of entities located outside the EEA based on Article 3 of the GDPR. An example in this regard would be helpful.

**2. Intragroup management and the concept of "inextricable link"**

This guidance hinges on the concept of an 'inextricable link' existing between the activities of the EU establishment and the processing carried out by a non-EU controller. We note that this concept comes from the Google Spain judgement. It would be helpful for the EDPB to further explain the notion of an 'inextricable link' beyond revenue raising in the EU. In particular, it would be helpful to better understand what sorts of factors are suggestive of no such link existing.

We would welcome further examples in this part of the guidelines, notably an example where there is an EU establishment involved in some way, but where the link with the processing outside of the EU is not 'inextricable', meaning that the non-EU firm is not caught by Art 3(1).

The following example might be helpful in showing that there are situations where the structure of a multinational company with presence in the EU does not necessarily entail the applicability of the GDPR with regards to the data processing that subsidiaries or

branches outside the EU carry out with respect to data subjects in such countries outside the EU.

**EBF suggested example:**

*A Taiwanese bank that belongs to a multinational concern with EU Head Quarters will not be bound by the GDPR, despite the EU presence, to the extent that it only targets the local Taiwanese market. The Taiwanese branch of such multinational organisation would have to abide by the GDPR if it were to target the EU market.*

**3. Necessity to clarify the roles and responsibilities of an EU processor when acting on behalf on a non-EU controller**

The EBF welcomes the clarification that “a non-EU controller will not become subject to the GDPR simply because it chooses to use a processor in the Union”. However, we believe that all the conclusions are not drawn from this position.

We agree in principle that the processor needs to comply, including regarding non-EU controllers, with international public policy provisions so as the Union territory not becomes a “data haven”. But the drafting of the guidelines on pages 11 and 12 in that regard is not sufficiently precise when it provides that “the processor will have to ensure its processing remains lawful with regards to other obligations under EU or national law”. Specifically, bullet 1 states that Article 28(3) is ‘directly applicable to data processors’. On our reading, this provision in fact applies to data controllers, compelling them to place contractual obligations on data processors. It would be a strange situation if the processor is required to demand that a controller impose obligations on it by contract.

In particular, it seems odd to apply in those circumstances the provisions of Article 28 (3)(h) of the GDPR regarding the audits or inspections conducted by the controller for the purpose of verifying whether the processor complies with the obligations laid down in the GDPR. Furthermore, we believe that attention should be given to avoid putting a disproportionate burden on EU processors (especially when acting on behalf of a non EU controller) and going beyond the requirements provided for by the GDPR, notably with regards to ‘data return’ transfers.

**4. Consistency in the draft guidelines**

The EBF welcomes the clarification that “the existence of a relationship between a controller and processor does not necessarily trigger the application of the GDPR to both, should one of these two entities not be established in the Union”. We would however welcome consistency on this point throughout the draft guidelines.

Indeed, on page 8, the draft guidelines read that “[i]n determining the territorial scope of the GDPR, geographical location will be important under Article 3(1) with regard to the place of establishment of (...) any business presence of a non-EU controller or processor”. The use of the word “**any**” is in our opinion to large when compared to the original statement that the existence of a relationship does not automatically trigger the GDPR application.

**EBF suggestion for amendment:**

*“In determining the territorial scope of the GDPR, geographical location will be important under Article 3(1) with regard to the place of establishment of:*

- *the controller or processor itself (is it established inside or outside the Union?);*

- **any the** business presence of a non-EU controller or processor (does it have an establishment in the Union?)”

EDPB Draft Guidelines on the territorial scope of the GDPR, page 8.

## **5. On the offering of goods and services and the targeting of EU data subjects**

The EBF would welcome clarification that the provision of services to persons domiciled in the EU is not covered by the GDPR insofar as it is based on reverse solicitation, as such services were not offered to the customer in the sense of targeting and that indeed, a certain degree of “intention to target” should be present.

In continuation of the above, we believe the indicators mentioned for “targeting” partly represent a very broad interpretation of the scope of application of the GDPR. This is notably the case on the last three examples provided by the EDPB on page 16 of the draft guidelines. Indeed, even if the three indicators (“*Mention of an international clientele*”, “*Use of a language not generally used in the country of the supplier*” and “*Offer of supply of goods to the EU*”) are common, it cannot be assumed that there is an offer specifically addressed to EU citizens. Almost every website is now available in English, providing information on delivery conditions abroad and commenting or rating functions could also be used to comment on international customers.

We would suggest clearly identifying and distinguishing indicators from stronger ones (e.g. domain name or currency) to weaker ones (e.g. mention of an international clientele) as this could otherwise lead to legal uncertainty.

**For more information:**

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**About the EBF**

The European Banking Federation is the voice of the European banking sector, bringing together 32 national banking associations in Europe that together represent a significant majority of all banking assets in Europe, with 3,500 banks - large and small, wholesale and retail, local and international - while employing approximately two million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that reliably handle more than 400 million payment transactions per day. Launched in 1960, the EBF is committed to a single market for financial services in the European Union and to supporting policies that foster economic growth.

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