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**Clarifying the Territorial Scope of the GDPR**

| by Chris Lim Sor Yeung |

The European Union (**EU**) General Data Protection Regulation (**GDPR**) is now more than six months old (our [e-alert](#) on the coming into force of the GDPR is accessible [here](#)). Since its inception, one of the questions that have arisen has been whether it is possible for an entity based outside the EU to be subject to the GDPR, and if yes, under what circumstances?

Pursuant to this, the European Data Protection Board has published Guidelines 3/2018 on the territorial scope of the GDPR (**Guidelines**), which seek to clarify the criteria to determine the application of the GDPR. The Guidelines are subject to public consultation beginning 23 November 2018 up to 18 January 2019.

The territorial scope of the GDPR is determined based on two main criteria, namely the “establishment criterion” and the “targeting criterion”:

(1) *The establishment criterion*

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- (a) Where a controller or processor established outside the EU exercises “a real and effective activity” through “stable arrangements” in the territory of the EU, it can be considered to have an establishment in the EU. Following this, the GDPR may apply even if a business merely has an individual representative in any EU country.
- (b) Once there is an establishment in the EU, the GDPR may be applicable if the processing of personal data is carried out “in the context of the activities of” such establishment. For this to apply, however, there has to be an “inextricable link” between the processing activity carried out by the non-EU controller or processor and the activities of its establishment in the EU. An example of what constitutes “inextricable link” would be a

situation where a non-EU entity which carries out its data processing activity outside of EU establishes a branch office in an EU country for marketing purposes. Where the marketing activity of the branch office in EU serve to make the business of the non-EU entity more profitable, an inextricable link exists.

(2) *The targeting criterion*

(a) Two types of activities can trigger the targeting criterion:

(i) Where the offering of goods and services is directed to a data subject in the EU: It is through the conduct of the controller or processor that would demonstrate whether or not there is intention to offer such goods or services to a data subject in the EU. Examples of directing the offering of goods and services to EU data subjects include the mention of dedicated addresses or phone numbers to be reached from an EU country, the offer to deliver to an EU country and the use of a language or currency of one or more of the EU countries.

(ii) The monitoring of data subject behaviour that takes place in the EU: To constitute “monitoring”, the controller would need to have a specific purpose in mind for the collection and subsequent reuse of the relevant data about an individual’s behaviour in the EU. The controller’s purpose for processing the data and any subsequent behavioural analysis or profiling techniques involving that data would also be considered. Examples of “monitoring” activities include the use of CCTV, online tracking through the use of cookies, behavioural advertisement and market surveys.

(b) For this criterion to apply, the data subjects in question have to be located in the EU at the moment when the relevant triggering activity takes place.

In a nutshell, the Guidelines will be a useful direction for businesses to assess and determine whether their data processing activities would trigger the application of the GDPR. In the event the GDPR is applicable, steps must be taken by the organisation to comply with the applicable requirements in the GDPR to avoid being sanctioned for violation of the GDPR.

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