

## Comments on the EDPB guidelines on the GDPR territorial scope

Our reference:	COB-DAT-19-006	Date:	17 January 2019
Referring to:	EDPB public consultation on the guidelines on the territorial scope of the GDPR		
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Pages:	2	Transparency Register ID no.:	33213703459-54

### Introduction

Insurance Europe welcomes the European Data Protection Board (EDPB) draft [guidelines](#) on the territorial scope of the General Data Protection Regulation (GDPR). It considers that, in general, the guidelines serve their purpose to define the criteria for determining the application of the GDPR territorial scope.

However, Insurance Europe is concerned that the guidelines leave open some questions on the applicability of international transfer provisions under Chapter V of the GDPR. Therefore, it invites the EDPB to provide the necessary clarifications on the issue described below.

### Lack of clarity on the applicability of international transfer provisions

The guidelines clarify that the existence of a relationship between a controller and a processor, where one of the two is based outside the EU/EEA, does not necessarily trigger the application of the GDPR to both (p.9). Therefore, a non-EU controller will not be subject to the GDPR simply because it chooses to use an EU processor (p.10).

Regarding international transfers, the guidelines define that an EU processor carrying out processing on behalf of a non-EU controller will have to comply with the provisions on transfers of data to third countries, as per Chapter V of the GDPR (p.11). **However, the guidelines do not provide guidance on whether the EU processor has to comply with the provisions on international transfers in relation to the return of data to the non-EU controller on whose behalf the processing is taking place.**

In the absence of guidance from the EDPB, it may be concluded that the EU processor would not be able to return to the non-EU controller the data that it processes on that non-EU controller's behalf, unless the latter has adopted appropriate safeguards or is based in a country for which an adequacy decision has been issued.

Example: An EU-based insurance undertaking (processor) has entered into a contract with an insurance undertaking within the same group that is based in a third country (controller) for handling claims on behalf of the latter. Pursuant to art. 28(3)(g) of the GDPR, the processor agreement states that the processor should

return to the controller all the personal data that it processes once the provision of services relating to the processing ends.

If there is no adequacy decision for the third country in which the controller is established and no appropriate safeguards are in place, the processor would not be able to transfer the data to the controller on whose behalf the processing takes place. This would be in contradiction to the processor agreement and art. 28 of the GDPR.

Nevertheless, it would be paradoxical for the processor not to be able to transfer/return the data to the non-EU controller, because:

- The processor acts on the documented instructions of the controller, including with regard to transfers of personal data to a third country (art. 28) and it would not, therefore, be legitimate to deny return/transfer of data to the controller (art. 28 (3)(a)).
- Return of data to the controller is a prerequisite for the implementation of the controller/processor agreement. For instance, the processor agreement should stipulate that, at the choice of the controller, the processor should be able to return all personal data to the controller once the provision of services ends (art. 28 (3)(g)).
- Transfer of data from the EU processor to the non-EU controller should be seen as return of data to the controller and not as a transfer under the meaning of Chapter V of the GDPR. In particular, the legislators introduced data transfer provisions under Chapter V with the aim of safeguarding data subjects' personal data protection when data is exported outside the EU. However, should a non-EU controller engage an EU processor, the controller is the exporter and the processor is the importer. In that context, data transfer provisions should not apply because the data is imported into the EU and not exported outside the EU.

#### **Recommendation**

The EDPB should clarify that processors established in the EU/EEA do not have to comply with the provisions on transfers of personal data to third countries under the GDPR when transferring data to the controllers on whose behalf the data is being processed.

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