January 17, 2019

Via Email: EDPB@edpb.europa.eu

The European Data Protection Board
Rue Wiertz 60, B-1047
Brussels

Re: Joint Comments on Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3)

Dear Sir/Madam:

On behalf of the American Bar Association Sections of Antitrust Law and International Law, we are pleased to submit the attached comments on Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3).

Please note that these views are being presented only on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Deborah A. Garza
Chair, Section of Antitrust Law

Robert L. Brown
Chair, Section of International Law

Attachment
COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW
ON THE EUROPEAN DATA PROTECTION BOARD GUIDELINES
3/2018 ON THE TERRITORIAL SCOPE OF THE GDPR

January 17, 2019

The views stated in these Comments are presented on behalf of the American Bar Association Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

I. Introduction

The Sections of Antitrust Law and International Law (“the Sections”) of the American Bar Association respectfully submit these comments on the Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3) (the “Draft Guidelines”) released for public consultation by the European Data Protection Board (“EDPB”) on November 16, 2018. These comments reflect the Sections’ experience in international and cross-border data protection issues. The Sections’ long involvement in these issues rests on the participation of both private and public sector lawyers and economists, reflecting a broad variety of backgrounds and viewpoints regarding legal rights relating to commerce in which personal data plays an important role. The Sections do not advocate on behalf of any particular interest or party; rather, we offer these comments as constructive input to the EDPB’s important role in fashioning a data-protection regime that will be of maximum benefit to all. ¹

The Sections commend the EDPB for the well-reasoned and balanced discussion reflected by the Draft Guidelines. In these Comments, the Sections make several suggestions designed to further both the goal of consistency with the terms of the General Data Protection Regulation (“GDPR”) and the goal of achieving the development of information markets and services that benefit EU data subjects and the global marketplace.

II. Executive Summary

The Sections’ comments make the following suggestions:

- **Article 3(1), EU controller with processor not subject to GDPR**: We recommend that the EDPB provide further guidance on the circumstances in which an EU controller should impose Article 28 (1) obligations on processors not in the EU.

- **Article 3(2)(a), application to business-to-business (B2B) services**: For consistency with the GDPR, we recommend that the EDPB clarify that Article 3(2)(a) applies only in circumstances when services are provided directly to EU data subjects, and not when those services are provided to firms representing those data subjects.

¹ The Sections note that, for the protection of due process under U.S. law, there should be a specific accommodation in the enforcement of the GDPR sufficient to allow for the transmittal of protected data where it is required pursuant to a court order in a litigation proceeding in the United States.
• Article 3(2)(b), “monitoring the behaviour” of EU data subjects: We recommend explicitly specifying that the detailed bulleted list (p. 18) is suggestive, not definitive, and recommend a correction to Example 15.

III. Specific Suggestions

1. Article 3(1)
• (d)(i): Processing by a controller in the EU using a processor not subject to the GDPR

Agreements with processors. The Sections recommend the following clarifications:

First, the Guidelines state that, in circumstances where a controller in the EU uses a processor not subject to the GDPR, “it is likely that” the controller “may need to consider” imposing on the processor, by contract, the obligations placed by the GDPR on processors subject to it. As an initial point, the Sections respectfully disagree that Article 28(1) of the GDPR requires a controller to impose a general obligation on a processor not subject to the GDPR to comply with the obligations of processors under the GDPR. Indeed, in the view of the Sections, Article 28 sets out comprehensively those provisions that must be included in contracts with processors (for example, the requirement set out in Article 28(3)), and general provisions such as Article 28(1) should not be read in such a way as to impose further requirements on such contracts.

Moreover, the Sections consider that any such requirement would be a material expansion of the scope of Article 28 of the GDPR, and that this would create significant difficulties in practice. For example, it is unlikely that a processor not subject to the GDPR would agree to comply with the requirements of Articles 37 to 39 of the GDPR concerning the appointment of a data protection officer if the processor were not subject to an equivalent requirement under the laws of its own jurisdiction.

In any event, it appears to the Sections that the language adopted by the EDPB (“it is likely that” and “may need to consider”) has been chosen carefully to make clear that this requirement may not apply in all circumstances. Given the importance of this point, the Sections consider that it would be helpful if the EDPB were to provide further guidance as to the circumstances in which such a requirement would apply.

The Sections also consider that the guidelines in this section are potentially contradictory as to whether a controller in the EU using a processor not subject to the GDPR is required to go beyond the requirements set out in Article 28(3) of the GDPR (other than as regards compliance with Chapter V). There are elements of this section that indicate that this is indeed what is intended: for example, the third sentence makes reference to Article 28(3), while the fourth sentence goes on to state that, “in addition” it may be necessary to consider imposing further obligations on processors. This implies that something more than compliance with Article 28(3) may be required. However, the following sentence (“That is to say, the controller would have to ensure that the processor not subject to the GDPR complies will the obligations, governed by a contract or other legal act under Union or Member State law, referred to Article 28(3)” – emphasis added) indicates that only those obligations referred to in Article 28(3) itself must be imposed on the processor. The Sections respectfully request the EDPB to clarify which obligations are envisaged in this section.

2. Article 3(2)(a)
• (b) Consideration 2a: offering of goods or services, irrespective of whether a payment of the data subject is required, to data subjects in the Union
Application to business to business (B2B) services. The Sections are aware of a significant level of discussion as to whether Article 3(2)(a) applies only to ‘business to consumer’ services, or also to ‘business to business’ services. Given the importance of clarity in connection with the extra-territorial scope of the GDPR, we recommend that the EDPB clarify its guidance on this topic.

In the Sections’ view, it is not entirely clear from the language of Article 3(2)(a) whether marketing services to data subjects in the EU purely in their capacity as representatives of firms, in circumstances in which it is obvious that those services would only ever be provided to those firms and not to the data subjects in a personal capacity, amounts to offering those services to those data subjects within the meaning of Article 3(2)(a).

The Sections consider the better view to be that Article 3(2)(a) applies only in circumstances where it is envisaged that the services will be provided directly to data subjects (i.e. consumers), and not where the services will be provided only to the firms that those data subjects represent.

In the Sections’ view, there are a number of reasons for preferring this interpretation:

1. First, Article 3(2)(a) refers to the services being offered “to […] data subjects”. In the case of services, the Sections consider that the natural meaning of this language is that it must be envisaged that the services would be provided to the data subjects themselves (and not, for example, to the firms that those data subjects represent). The Sections do not consider that it is sufficient for these purposes that any marketing of those services by the controller may be directed towards data subjects in the EU, in circumstances where it is clearly not envisaged that the data subjects themselves would be the recipients of the services.

2. Second, whilst Article 3(2)(a) provides that it is irrelevant whether payment is to be made for the relevant services, it envisages that any payment would be made by the data subject (“irrespective of whether a payment of the data subject is required” – emphasis added). In the Sections’ view, this envisages that the recipient of the services, and therefore the person responsible for payment (if any), would be the data subject. The words “of the data subject” would otherwise appear to have no function. Moreover, if, contrary to the Sections’ view, it is correct that Article 3(2)(a) applies to business to business services, the Sections consider that the words “of the data subject” are positively misleading as to the scope of the provision.

3. Third, the words “to such data subjects” (emphasis added) indicate that, in circumstances falling within Article 3(2)(a), the GDPR applies in respect of the processing of the personal data of the data subjects to whom the services are offered. In the Sections’ view, this produces a sensible result in the context of services offered to a consumer. However, in the context of services offered to a firm, it would produce results that were, in the Sections’ view, entirely arbitrary. For example, if Article 3(2)(a) applied in respect of services provided by a non-EU service provider to an EU firm (by virtue of those services being “offered” to those employees of the EU firm who are involved in making procurement decisions on behalf of that firm), and those services involved the processing of personal data of large numbers of that EU firm’s employees, the GDPR would apply only in respect of the personal data of the employees to whom the services were “offered”, but not to the personal data of any of the firm’s other employees. It is not at all clear to the Sections why such a result would be intended, or why the personal data of those employees responsible for making procurement decisions should be singled out in this way.

3. Article 3(2)(b) -- “Monitoring the behaviour”
In its analysis of Section 3(2)(b) and Recital 24, the Guidelines quite helpfully frame the analysis around the scope of monitoring required to trigger GDPR jurisdiction over an entity outside the EU. Recital 24, in particular, makes clear that the scope of monitoring must be more pervasive than a simple collection of data:

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, behaviours and attitudes.

As the recital suggests and the Guidelines make clear, “the use of the word ‘monitoring’ implies that the controller has a specific purpose in mind for the collection and subsequent reuse of the relevant data about an individual’s behaviour with the EU.” Guidelines at 18. The Sections agree with this analysis and approach, which appears consistent with the text and goals of the GDPR.

In contrast, however, the bulleted list following the analysis does not include the same degree of analytical sophistication, suggesting that a broad range of activities that may not involve “profiling a natural person” for use in “predicting her or his personal preferences” will nonetheless trigger jurisdiction under the GDPR. In particular, the bulleted list (p. 18) includes “behavioural advertisement” as a broad category that would satisfy Section 3(2)(b). Behavioural advertisement, as a general topic, encompasses a wide array of advertising techniques, some of which may involve profiling and predictive analytics and some of which do not. The Sections believe it is overbroad to assert that all “behavioural advertising” would necessarily trigger jurisdiction under Section 3(2)(b). Similarly, many of the other bulleted activities are general topics that may constitute monitoring the behaviour of EU data subjects, but equally may not. “Geo-location activities, in particular for marketing purposes” could qualify if part of an effort in profiling and subsequent prediction of behavior; just as easily, a geolocation analysis that offers a data subject who happens to be in a particular location a particular offer based solely on location, without storing that location or otherwise profiling the data subject, does not involve profiling and prediction at all. Expanding the bulleted list with a substantive analysis of how each of the six topics could lead to jurisdiction under Section 3(2)(b) may be beyond the intent of the Guidelines, of course. The Sections would suggest, in the absence of that type of expanded discussion, that the Guidelines make clear that the bulleted list is a number of examples of areas in which Section 3(2)(b) could be triggered, rather than a list that could be read as activities that do trigger Section 3(2)(b).

Similarly, Example 15 is an inaccurate statement of the manner in which retail movement analysis is actually accomplished. The example finds that the GDPR would reach a consultant outside the EU that assisted a shopping centre in France to design its retail space based on the movement of customers through that space based on wifi signal analysis. In this example, the consultant would be undertaking a one-time exercise of the movement of customers to recommend a particular physical layout of the shopping centre, and would not be linking movement to any particular EU data subject, storing that data to create a profile, or attempting to predict the behavior of that data subject. Indeed, many companies in this space use anonymisation techniques to ensure that they receive no identifying data, and in any event are interested solely in the movement of the subjects around a physical space rather than profiling them or marketing to them. If there are no identification of data subjects, no profiling, and no attempts to market or otherwise predict the behavior of those data subjects, it is difficult to envisage how Section 3(2)(b) or Recital 24 could be satisfied. The Sections would suggest that the example be deleted, or be phrased as one that “could” trigger jurisdiction rather than a categorical statement that jurisdiction would be established.
IV. Conclusion

The Sections very much appreciate the opportunity to comment on the Draft Guidelines, and commend the EDPD for this open and transparent process. The Sections stand ready to clarify any of the matters discussed herein, to answer any questions, or to assist in any other appropriate way.