

Territorial Jurisdiction of GDPR and its Application in India

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ABSTRACT:

The General Data Protection Regulation (GDPR) is the new and upcoming privacy law governing the personal data of individuals within EU. GDPR in application is widely in use, is still bereft of well-founded criticism. The authors herein seek to diagnose the territorial jurisdiction or scope of GDPR and to which businesses does it apply. While it was the required step in terms of governing privacy laws, it is far from being a perfect method in terms of scope of the territorial jurisdiction.

The major scope of the article is the territorial scope of GDPR, and how does it apply to businesses established within EU and how its reach has been extended to non-EU businesses. The article primarily focusses on Article 3 of the GDPR and has special focus in relation to the applicability of GDPR to the Indian organisations and businesses. The author herein focusses on different tests established under GDPR for an institution to come under the ambit of GDPR including the “establishment test”, “goods or services test” and “monitoring test”.

The authors have extensively relied upon research papers published in reputed contemporary journals, and have gone through compliance policies of different organisations. Cases laws from European jurisdictions have been taken into account and the guidelines of the European Data Privacy Board have been dealt with, too.

I. INTRODUCTION

General Data Privacy Regulation (GDPR) is a regulation that requires businesses to protect the personal data and privacy of EU citizens for transactions that occur within EU member states.¹ Before the introduction and application of GDPR in Europe, the privacy laws in Europe were governed by the Directive 95/46/EC which was adopted in 1995. With the global developments in the field of privacy and technology, the privacy law of Europe mandated an update to deal with the new and upcoming problems in the field. Thus, GDPR was enacted by member nations of the European Union to safeguard its citizen from theft or misuse of data by companies and provide for stricter guidelines to companies in regards to compliance with the regulations.

Since its inception, the question regarding the territorial scope or the jurisdiction of the GDPR has been hotly contested, with businesses trying to determine whether the regulations apply to their activities and if they do, what is their course of action regarding the same. On the question of territorial scope of GDPR, it states that it deals with processors established within the EU, with relation to activities, or by the virtue of Public International Law.² The author herein discusses the application of GDPR and how Indian businesses

¹ M. Nadeau, *General Data Protection Regulation (GDPR): What you need to know to stay compliant*, CSO, (April 23, 2018), <https://www.csoonline.com/article/3202771/general-data-protection-regulation-gdpr-requirements-deadlines-and-facts.html>

² General Data Protection Regulation, 2016/679, Art 3, (2016).

are affected by the regulations in detail.

II. ESTABLISHMENT TEST

Article 3(1) states that “this Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not” and evolves an “establishment” test. Under this, if a business or an organisation has an establishment within the European Union and it processes data in context of such activities of the establishment, then such organisations are held to be liable under GDPR. It does not matter where the processing takes place (i.e. in the EU or not), whether it is undertaken by a third party (such as a subcontractor) or whether the personal data relates to data subject’s resident or located in the EU.³ The main concern of this test is with the establishment and whether the processing activities are being undertaken in context to the activities of the establishment. The question of what the term “establishment” connotes has often come up for debate in European Courts. In *Weltimmo v. NAIH*⁴, the Court of Justice of European Union (CJEU), adopted a flexible definition of the term establishment and what all comes under it. Similarly, in *Google Spain SL, Google Inc. v. AEPD, Mario Costeja Gonzalez*⁵, famously known as the “right to be forgotten” decision, the court dealt with the activities of an organisation in relation to EU members. Thus, what can be inferred from the above cases is that establishment does not hinge upon the legal sense, and once this test is met, GDPR is said to be applied.

In the Indian context, when an organisation or business is established in the EU, and is said to be processing personal data in context to the activities of the establishment, then such an organisation will be held liable under GDPR regardless of whether it processes the data in EU or not.

III. GOODS OR SERVICES TEST

Article 3(2) of GDPR deals with businesses which are not established within the EU but still to which GDPR applies. Basically, it extends the reach of GDPR to businesses established outside of EU. The goods or services test lays down that when a business offers “goods or services” to members of EU nations, it comes under the ambit of this article and thus GDPR applies. Certain factors like an organisation can be accessed by the members of the union, or whether it uses the language or currency of a member state, targets customers of member state etc. help in determining whether an activity qualifies as to be considered as offering goods and services and whether it triggers the application of the said article. However, in other

³ D. Smith, *Preparing for the General Data Protection Regulation*, A&O, (Jan, 2018), <http://www.allenoverly.com/SiteCollectionDocuments/Radical%20changes%20to%20European%20data%20protection%20legislation.pdf>

⁴ *Weltimmo v. NAIH*, (C-230/14).

⁵ *Google Spain SL, Google Inc. v. AEPD, Mario Costeja Gonzalez*, (C- 131/12).

such provisions in other regulations, a different approach has been followed. A similar requirement can be found in Article 15 of Regulation 44/2001, known as the Brussels Regulation, in that context, a joint declaration by the EU Council and the Commission states that “the mere fact that an Internet site is accessible is not sufficient of Article 15 to be applicable.⁶ Thus, the mere availability of accessibility of a particular business online, does not qualify it to be considered as sufficient under the regulation and comes into conflict with article 3(2) of GDPR. In

*Pammer v Reederei Karl Schlüter GmbH & Co*⁷, and *Hotel Alpenhof v Heller*⁸, the CJEU discussed about what is considered as “direct activity” under the said Brussel regulations, and held that trader must have manifested its intention to establish commercial relations with such consumers. Thus, there is clear and direct contradiction with GDPR and the Brussel regulations and other EU regulations, and there is no clarity regarding the same.

IV. MONITORING TEST

Article 3(2) lays down another test for a business, which is not established under EU, to be held liable under GDPR and is known as the “Monitoring test”. For Article 3(2)(b) to trigger the application of the GDPR, the behaviour monitored must first relate to a data subject in the Union and, as a cumulative criterion, the monitored behaviour must take place within the territory of the Union.⁹ Thus, in the monitoring test, if the organisation is said to be monitoring the personal data of any individual in the EU. An interesting concept under this article is regarding the nationality of the individual, under which GDPR is applicable regardless of the nationality of the individual whose data is processed. Thus, processing data of an individual who is a citizen, resident, tourist of EU, will make an organisation liable under the GDPR.

In the Indian context, if an Indian business is established as providing goods or services to members of EU or is said to be monitoring the data of individuals of the EU, such business or organisation will be said to be liable under GDPR.

Another distinction which is important for us to make is that under article 3, a distinction is made between a controller and a processor, which has certain impacts in terms of its jurisdiction. The controller “determines the purposes and means of the processing of personal data”, while the processor “processes

⁶*The GDPR's Reach: Material and Territorial Scope Under Articles 2 and 3*, WR LLP, (May 2017), https://www.wileyrein.com/newsroom-newsletters-item-May_2017_PIF-The_GDPRs_Reach-Material_and_Territorial_Scope_Under_Articles_2_and_3.html

⁷*Pammer v Reederei Karl Schlüter GmbH & Co*, (C-585/08).

⁸*Hotel Alpenhof v Heller*, (C-144/09).

⁹Guidelines 3/2018 on the territorial scope of the GDPR (Article 3), (Nov 16, 2018), https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_3_2018_territorial_scope_en.pdf

personal data on behalf of the controller".¹⁰ The usage of these two separate terms has led to certain questions regarding the application of GDPR when a EU processor combines with a non- EU controller, or vice versa, what is the applicability of GDPR on the non-EU organisation. The 2018 EDPB Guidelines makes it clear that when an EU controller works with a processor outside of the EU, the controller is mandated through a legal contract to make sure that the processor processes the data in accordance with GDPR. Thus, if an EU controller works with an Indian processor, the Indian processor needs to comply with the regulations or else will be held liable under contract with the controller.

V. PUBLIC INTERNATIONAL LAW

Article 3(3) of the GDPR deals with its application by virtue of Public International law. When an organisation is not established under EU, but is in a place where member state law is applicable by the virtue of public international law, such regulations will also apply on such an organisation. The embassies and consulates of member nations come under the ambit of this article.

VI. CONCLUSION

The question of territorial scope of GDPR remains a widely debated topic prevalent of certain legal lacunas. Article 3 governs the territorial jurisdiction of GDPR and states certain tests governing institutions established under EU or outside of it. If an organisation is established under EU, the regulations apply on such organisations. Article 3(2) is seen as extending the reach of the regulations to organisations of other country and thus, such controllers and processors of other countries also need to take into consideration the compliance with GDPR.

¹⁰General Data Protection Regulation, 2016/679, Art 4, (2016)