



Bonn, Den Haag, Dublin, Madrid, Milan, Paris, Vienna, Warsaw

CEDPO comments on
Guidelines 3/2018 on the territorial scope of the GDPR (Article 3)
from November 16th, 2018

1. Introduction

European data protection law imposes an obligation to designate a representative in the Union to any controller or processor falling under the scope of Article 3 para. 2 GDPR. The representative in the Union is not an entirely new concept. Art. 4 para. 2 of the former Data Protection Directive 95/46/EC already described the representative in the member state. Furthermore, Directive 2012/19/EU and Directive 90/385/EEC as amended by Directive 2007/47/EC require similar representatives in other legal areas. Nonetheless, controllers and processors as well as supervisory authorities do lack experience regarding the representative. The interpretation of Art. 4 (17) and Art. 27 GDPR should therefore be based closely on the wording of the law.

2. Representative vs. external Data Protection Officer

The EDPB states, that the function of the representative in the Union shall not be compatible with the role of an external data protection officer (Guidelines, p. 20).

In our view, a Data Protection Officer established in the Union may also be appointed as a representative as long as there is no conflict of interest (see Art. 38 para. 6 GDPR). Indeed, there is no conflict of interest when the representative is addressed by a supervisory authority or data subjects regarding issues related to the processing of personal data.

The EDPB's own example case illustrates this very well: *“An external DPO also acting as representative in the Union could for example be in a situation where he is instructed to communicate to a data subject a decision or measure taken by the controller or processor which he or she had deemed un-compliant with the provisions of the GDPR and advised against.”* (Guidelines, p. 21 footnote 25). But if there was no representative, and a data subject had contacted the DPO directly, the decision or measure taken by the controller or processor would still be the same. The DPO just relays information given by the controller or processor, just as the representative would do.

A conflict of interest only arises, when the representative is contractually obligated to fulfil other tasks in addition to Art. 27 para 4 GDPR, i.e. deciding to refuse to act on a request (Art. 12 para 5 lit. b GDPR).

3. Liability of the representative

The EDPB states, that *“it was the intention to enable enforcers to initiate enforcement action against a representative in the same way as against controllers or processors. This includes the possibility to impose administrative fines and penalties, and to hold representatives liable.”* (Guidelines, p. 23)

CEDPO raises the question, how such liability can be construed, since the representative does not belong to the group of addressees for damages pursuant to Art. 82 para. 1 GDPR and he/she also does not belong to the addressees of a fines pursuant to Art. 83 para 4 lit a-c GDPR.

The wording of the GDPR only explicitly refers to the controller, the processor, the certification body and the monitoring body as lawful addressees. An independent liability of the representative regarding fines, as had been proposed in Council Draft Art. 79 para. 3a, did not prevail during the legislative procedure (see Council Document 11013/13, p. 211.).

A liability of the representative pursuant to Art. 83 para. 5 lit. e GDPR for failure to grant access to information also appears doubtful, since “access” is to be understood solely with regard to access to premises pursuant to Art. 58 para. 1 lit. f GDPR. The representative is mentioned exclusively in connection with Art. 58 para. 1 lit. a GDPR.

Recital 80 merely explains that the designated representative should be subject to enforcement proceedings in the event of non-compliance by the controller or processor. But the GDPR itself does not warrant enforcement except for Art. 58 para. 1 lit. a. As a result, it appears that the rules governing possible enforcement proceedings against a legal representative, if they exist, are neither explicit nor clear.

CEDPO would therefore welcome additional clarification from the EDPB regarding the liability of the representative.

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Contact information

Email: info@cedpo.eu / Website: www.cedpo.eu