

THE PRACTICAL NOMAD

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The Practical Nomad: How to Travel Around the World
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Bundesbeauftragte für den Datenschutz und die Informationsfreiheit (BfDI)
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BfDI file number: 24-191 II#5154

Request for reconsideration

On 19 August 2022, I submitted a complaint to you and to the Landesbeauftragte für Datenschutz und Informationsfreiheit Nordrhein-Westfalen (LDI-NRW) against Deutsche Telekom AG and its subsidiary T-Mobile USA, Inc., for violations of the General Data Protection Regulation (GDPR) and the German law transposing the GDPR.

On 26 August 2022, I was informed that the LDI-NRW had determined that it was not competent to handle my complaint, and that responsibility over this matter lay with the BfDI. (LDI-NRW reference number 53.9 – 5664/22.)

On 13 September 2022, I received a letter by e-mail from you, dated 8 September 2022, stating that the BfDI “are not competent for the handling of this case.... The application of the GDPR requires the data subject to be within the European Union. For non-EU citizens who do not stay or reside within a member state of the EU, the regulations of the GDPR are not applicable. Therefore I am not able to help you with your concern.”

I request that you reconsider this opinion regarding my complaint.

I believe that your rejection of my complaint on the basis stated in your message is contrary to the plain language of the GDPS itself, as well as contrary to the guidance of the European Data Protection Board regarding the territorial scope of the GDPR.

There are at least three independent legal bases for the applicability of the GDPR to my complaint, any one of which would be sufficient to establish your jurisdiction:

1. Part of my complaint concerns data collected and processed by T-Mobile USA, Inc., a subsidiary of Deutsche Telekom which was and is controlled by Deutsche Telekom, a German corporation subject to the GDPR and German law.

Deutsche Telekom describes T-Mobile USA as a “subsidiary” of Deutsche Telekom.¹ When I became a T-Mobile USA customer in 2004, and when the data subject to my complaint began to be collected, T-Mobile USA was a division of Deutsche Telekom owned 100% by Deutsche Telekom. At the time of my complaint, Deutsche Telekom said that the “stake held by Deutsche Telekom (directly/indirectly)” in T-Mobile was 64.78%.²

The Deutsche Telekom Web site has since been changed, presumably in response to my complaint. The same page on the Deutsche Telekom Web site now says that the stake held by Deutsche Telekom has been reduced to 48.4%.

But even if this is correct, and even if T-Mobile USA were no longer controlled by Deutsche Telekom (as in fact it still is controlled, as discussed below), Deutsche Telekom would still be responsible, and the GDPR would apply, to the data collected during the time that T-Mobile USA was a division 100% owned by Deutsche Telekom.

This is especially significant because some of the most sensitive data about me held by T-Mobile USA, and which was disclosed by T-Mobile USA to unauthorized third parties in a data breach a year ago, was collected when I first opened my account in 2004.

For example, T-Mobile USA has notified me that the data it disclosed in a data breach last year includes my U.S. Social Security Account Number. A Social Security Account Number is not required to have a mobile phone account. This information would have been obtained only at the time my account was opened, and only for the purpose of assessing my credit rating. So the personal information about me that is subject to this complaint includes specific pieces of information that were obtained by T-Mobile USA in 2004, when T-Mobile USA was a division 100% owned by Deutsche Telekom and when I knew that this information would be protected by German and European Union law. Deutsche Telekom remains responsible for this data, and the GDPR applies to it.

1. See tab for “international subsidiaries: North America”, at <<https://www.telekom.com/en/company/worldwide>>.

2. See screenshot of this Web page as of 7 August 2022, <<https://hasbrouck.org/documents/T-Mobile/Telekom-subsidiaries-7AUG2022.png>>

Even after several revisions to its corporate structure since 2004, T-Mobile USA is still a subsidiary controlled by Deutsche Telekom. Regardless of the percentage of stockholder voting rights controlled by Deutsche Telekom, the current T-Mobile USA stockholders' agreement entitles Deutsche Telekom to nominate nine of the fourteen members of the T-Mobile USA Board of Directors.³

Under U.S. law, Deutsche Telekom is deemed to be “controlled” by Deutsche Telekom. As a “controlled” corporation, T-Mobile USA is exempt under U.S. law from many of the requirements that would be applicable to an “independent” corporation.

Pursuant to U.S. corporate governance law, the majority of the Board of Directors may direct T-Mobile USA to take any action not contrary to U.S. law. Compliance with the GDPR would not require T-Mobile USA or its Board of Directors to violate any U.S. law.

Any decision that T-Mobile USA has, throughout the time since 2004, been “independent” of Deutsche Telekom, would be contrary to the facts. At a minimum, any such finding could be made only after your investigation and clarification of the present and past relationship between Deutsche Telekom and T-Mobile USA and the actual authority which Deutsche Telekom could exercise, if it chose to do so, over T-Mobile USA.

2. Part of my complaint concerns “roaming” network connection, mobile Internet, SMS, and voice calling data collected and processed by Deutsche Telekom, and therefore subject to the GDPR pursuant to Article 3(1).

Article 3(1) of the GDPR provides 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.” If this condition is satisfied, the GDPR applies regardless of the citizenship, residence, or location of the processing or the data subject.

This is made clear by Recital 14 to the GDPR and by the guidance of the European Data Protection Board concerning the territorial applicability of the GDPR.⁴

With respect to jurisdiction pursuant to Article 3(1), the EDPB states as follows:⁵

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3. “Amended and restated stockholders’ agreement by and among Deutsche Telekom AG, Softbank Group Corp. and T-Mobile US, Inc., dated as of April 1, 2020”, Section 3.1, “Board Representation”, as filed with the U.S. Securities and Exchange Commission:
<<https://www.sec.gov/Archives/edgar/data/1283699/000119312520093622/d886127dex102.htm>>.
 4. European Data Protection Board, “Guidelines 3/2018 on the territorial scope of the GDPR (Article 3)”, Version 2.1, 12 November 2019, English version:
<https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_3_2018_territorial_scope_after_public_consultation_en_1.pdf; German version, “Leitlinien 3/2018 zum räumlichen Anwendungsbereich der DSGVO (Artikel 3)”, Version 2.0, 12 November 2019:
<https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_3_2018_territorial_scope_after_consultation_de.pdf>.
 5. EDPB Guidelines 3/2018, page 10 of English version.

“[G]eographical location is not important for the purposes of Article 3(1) with regard to the place in which processing is carried out, or with regard to the location of the data subjects in question.

“The text of Article 3(1) does not restrict the application of the GDPR to the processing of personal data of individuals who are in the Union. The EDPB therefore considers that any personal data processing in the context of the activities of an establishment of a controller or processor in the Union would fall under the scope of the GDPR, regardless of the location or the nationality of the data subject whose personal data are being processed. This approach is supported by Recital 14 of the GDPR which states that ‘[t]he protection afforded by this Regulation should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data.’”

3. Part of my complaint concerns “roaming” network connection, mobile Internet, SMS, and voice calling data collected in Germany while I was physically present in Germany, and therefore subject to the GDPR pursuant to Article 3(2).

Even with respect to the activities of T-Mobile USA (as distinct from the activities of Deutsche Telekom in collecting and processing roaming data), and even if T-Mobile USA were determined never to have been controlled by Deutsche Telekom (which would be contrary to the corporate governance structure and history), data pertaining to my roaming in Germany would be subject to the GDPR pursuant to Article 3(2).

Article 3(2) provides that, “This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:... (b) the monitoring of their behaviour as far as their behaviour takes place within the Union.

Data pertaining to my roaming use of Deutsche Telekom cell towers and infrastructure to connect to mobile Internet, telephone, and SMS networks, while travelling in Germany, is clearly data related to my behavior within the European Union.

According to the EDPB Guidelines concerning Article 3(2) of the GDPR:⁶

“The wording of Article 3(2) refers to ‘personal data of data subjects who are in the Union’. The application of the targeting criterion is therefore not limited by the citizenship, residence or other type of legal status of the data subject whose personal data are being processed. Recital 14 confirms this interpretation and states that ‘[t]he protection afforded by this Regulation should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data’.

“This provision of the GDPR reflects EU primary law which also lays down a broad scope for the protection of personal data, not limited to EU citizens, with

6. EDPB Guidelines 3/2018, pages 14-15 of English version.

Article 8 of the Charter of Fundamental Rights providing that the right to the protection of personal data is not limited but is for ‘everyone’.

“While the location of the data subject in the territory of the Union is a determining factor for the application of the targeting criterion as per Article 3(2), the EDPB considers that the nationality or legal status of a data subject who is in the Union cannot limit or restrict the territorial scope of the Regulation.

“The requirement that the data subject be located in the Union must be assessed at the moment when the relevant trigger activity takes place, i.e. at the moment of offering of goods or services or the moment when the behaviour is being monitored, regardless of the duration of the offer made or monitoring undertaken.”

At the moments when wireless roaming data was collected by Deutsche Telekom, I was located in Germany. Data about my roaming was collected by Deutsche Telekom because I was located in Germany, targeting people located in Germany. If I had been located in some other country, roaming data would have been collected by some other roaming partner. This data is therefore subject to the GDPR, pursuant to Article 3(2).

It would be an extremely serious derogation from the GDPR if you were to find that a visitor to Germany whose personal information is collected and processed by a German company, while they are travelling in Germany, is not protected by the GDPR.

It is unclear to me whether your message of 8 September 2022 was intended as formal notice of a final decision regarding my complaint, or merely an informal notice of your initial assessment of my complaint. It is possible that you may have misunderstood the factual basis for my complaint, especially as it was detailed and submitted in English.

I apologize again that I do not know any German. I thank you very much for accepting and responding to my complaint in English.

I will be in Europe in late October 2022, and could come to Bonn to meet with you in person if that would help clarify or facilitate your handling of my complaint. Please let me know if a face-to-face meeting would be helpful to your investigation of this matter.

If, after reconsideration, your final decision is to deny my complaint, I request that you provide me with formal notice of that decision, the legal basis for that decision, and any available procedure for appeal or judicial review of that decision.

Your message of 8 September 2022 concludes by suggesting that I “apply to the competent U.S. data protection/regulation authorities”. Unfortunately, there is no general data protection law, regulations, or independent data protection authority in the USA. This is why, when the rights of visitors to the EU such as myself are violated, during our presence in the EU, by EU entities such as Deutsche Telekom, our only recourse is through the institutions of the EU and its member states – such as your agency.

I look forward to your reconsideration of your decision to reject my complaint.

Sincerely,

Edward Hasbrouck