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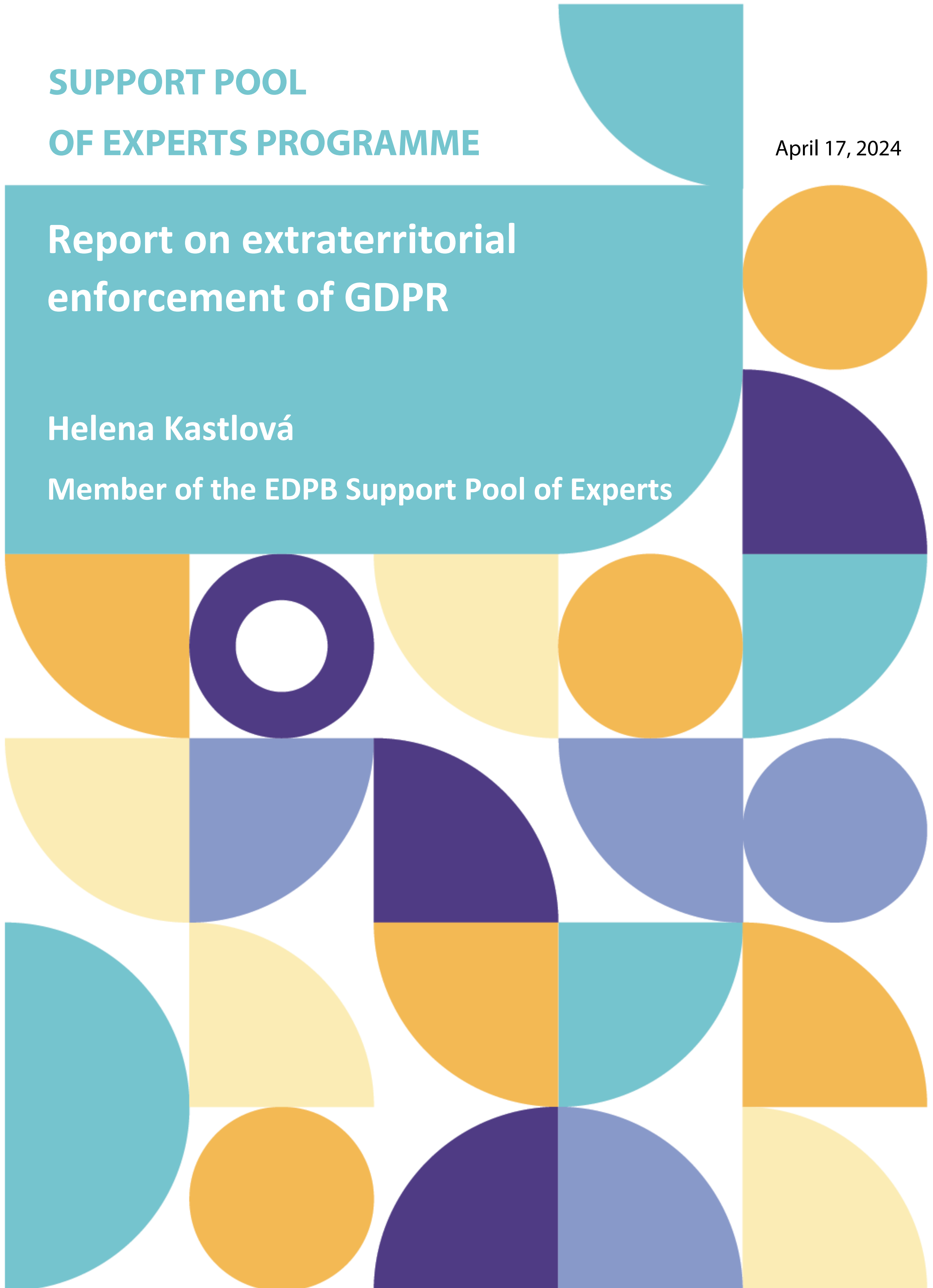

Report on extraterritorial enforcement of GDPR

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This report was commissioned as part of the EDPB's Support Pool of Experts initiative, which aims to support cooperation among Data Protection Authorities (DPAs) by providing expertise and tools related to enforcement.

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INTRODUCTION AND SCOPE

This Report examines the extent to which the GDPR can be effectively enforced by DPAs against entities established outside the EU that fall under the scope of the GDPR by operation of Art. 3(2) GDPR, with special focus on potential enforcement in the United States.

The scope of this Report is based on the ToR prepared by EDPB.[1] The key question for the EDPB is what legal options DPAs have to collect fines in the United States.[2] By posing several more specific questions EDPB is also interested in potential enforcement actions by DPAs outside of the EU more broadly, exercise of investigative powers in the United States and recognition and enforcement of decisions established in court. [3] An administrative fine imposed by NL DPA on a U.S. based company for failure to appoint a representative in the EU in accordance with Art. 27 of the GDPR will be used as a practical example (hereinafter "Locatefamily case").[4] However, the scope of this Report is much broader to provide the DPAs with a comprehensive picture and advise them of the pitfalls of the extraterritorial enforcement so that they are better equipped for their future enforcement endeavors.

The main part of this Report will proceed as follows: The first chapter ("The Extraterritoriality of GDPR") briefly examines the GDPR's broad extraterritorial jurisdictional claims from a policy standpoint, distinguishes between prescriptive and enforcement jurisdiction and assesses the legitimacy of the prescriptive jurisdiction and its impact on the enforcement jurisdiction. The second chapter ("Extraterritorial Enforcement") addresses various aspects of the extraterritorial enforcement (both generally, and in the United States specifically), following the questions of the EDPB: (i) exercise of DPAs investigative powers outside of the EU including various cooperation mechanisms, (ii) rules for recognition and enforcement of foreign judgments, (iii) rules for recognition and enforcement of foreign administrative acts. The Report further proceeds with an in-depth analysis of relevant U.S. case law to demonstrate how those rules apply

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[1] Terms of Reference: How to take enforcement action on the GDPR outside of the EU, Annex 2 to Contract No. 2023-008 between EDPB and Helena Kastlová from November 22, 2023 (hereinafter "ToR").

[2] ToR, Sec.2.

[3] *See* ToR, Sec. 2: "The key question is what legal options the NL SA has to collect the fine she imposed. The NL SA would like to see the following questions answered:

> 1) Can the DPA exercise its investigative powers outside of the EU, for example on US territory (possibly with local authorities' consent)?
>
> Can the NL SA bring legal proceedings with a Dutch decision that is established in court (after appeal or failure to lodge an objection/appeal), or are they not recognized at all?
>
> 2) Is it of interest whether or not violations of the GDPR (e.g. Article 27 GDPR) are to be regarded as criminal/civil offences? If so, how should an administrative fine of the NL SA be considered?
>
> 3) Can the NL SA take legal action and collect/fine outside the Netherlands (for example in the US)? If so, what is needed for that?
>
> 4) As the example is set in the US, is the answer to any of the above questions different in individual U.S. states where privacy laws apply (such as the CCPA in California) or at federal level if enforcement concerns a violation of already protected rights (such as children in COPPA or health data in HIPAA), or if a federal privacy law is passed?

[4] For summary of the case in English refer to the press release available at https://www.autoriteitpersoonsgegevens.nl/en/current/dutch-dpa-imposes-fine-of-eu525000-on-locatefamilycom (last visited on March 31, 2024).

in context. The final part of the Report describes the opportunities to receive enforcement assistance within the new EU–U.S. Data Privacy Framework.

The term "extraterritorial enforcement" of GDPR used in this Report refers simply to enforcement in third countries outside of the EU's territory.[5] This Report will only examine situations where the sanctioned entity has no establishment, no representative and no assets within the EU territory. If there are seizable assets with the EU territory, the enforcement action could be taken on those assets under the local laws.

EXECUTIVE SUMMARY

Extraterritorial Reach of GDPR

Given the current largely borderless data processing practices and in the light of the overall objective of an effective protection of human rights the extraterritorial reach of GDPR seems reasonable as a matter of policy. However, the lawfulness of the assertion of this extraterritorial jurisdiction under international law is questionable at best and practical enforcement of these provisions by the DPAs or courts against entities without any property within the EU's territory seems very difficult, if not impossible. Unenforceable provisions may discredit the credibility of the law. The DPAs are bearing the burden of evaluating the possibility of practical enforcement of the GDPR outside of the EU. That should be the legislator's task in the first place.

Whenever a state (or the EU in this case) wants to exercise its jurisdiction, it must have a sufficiently close connection to the persons, property or acts concerned. There are several principles of jurisdiction which may be asserted under contemporary international law in order to justify the extraterritorial jurisdiction. It seems that the EU has based the prescriptive extraterritorial jurisdiction on the 'effects doctrine', i.e. conduct happening outside of the territory having effects inside. Assertion of jurisdiction based on this principle, however, requires a 'substantial effect' of the conduct on the territory of the prescribing state. Yet, applicability of GDPR is based on the 'targeting' criterion and the 'substantial effect' of the conduct is not required. Although there are certain arguments in favor of such broad extraterritorial prescriptive jurisdiction, its legitimacy is at least controversial from the public international law standpoint.

The internationally valid exercise of prescriptive jurisdiction is a prerequisite for the valid exercise of enforcement jurisdiction with respect to that law. The practical consequence may be a higher likelihood of refusal of such jurisdictional claim by foreign countries as excessive or unreasonable.

[5] For the purposes of the Report, references to the EU and EU Member States should be understood as also covering the European Economic Area (EEA) States. The Agreement on the European Economic Area provides for the extension of the European Union's internal market to the three EEA States: Iceland, Liechtenstein and Norway. GDPR has been incorporated into Annex XI of the Agreement on the EEA and it is thus covered by that Agreement.

Exercise of DPAs' Investigative Powers Outside of the EU

Under the norms of the public international law one state cannot perform any official action on a territory of another state without the consent of the latter. DPAs' actions are attributable to the state. Therefore, any exercise of DPAs' investigative powers outside of the EU territory always requires the respective state's consent. Such consent may be acquired on a case by case basis or included in an international agreement.

From a practical standpoint, it is advisable for the DPAs to first look into options within the existing mechanisms for international cooperation in place between the countries in question. The local data privacy authorities are typically best positioned to assist the DPAs with actions regarding the entities within their jurisdictional reach. It should be noted that any assistance from foreign enforcement entities will always be limited to the scope of their powers within their own jurisdiction.

Exercise of DPAs' Investigative Powers in the United States

The most important regulator and enforcer in the data privacy area in the United States is the Federal Trade Commission (FTC). FTC appears to be in general the best point of contact for the DPAs when seeking cooperation from a governmental authority on the U.S. territory. The DPAs should be aware, however, that there are other federal agencies and departments that enforce federal laws in various specific narrow sectors (such as healthcare or education). There is no central federal data protection authority in the United States. In addition, there are state-level statutes protecting a wide range of privacy rights and corresponding state-level enforcement mechanisms. Therefore, the cooperation may be/need to be sought from various entities depending on the specific facts of the case.

FTC entered into Memoranda of Understanding (MoU) with the Dutch DPA and the Irish DPA regarding mutual assistance in the enforcement of data protection laws. Those instruments (same as any future potential MoU with other EU member states) are not legally binding, though, and cooperation is essentially rendered on a completely voluntary basis. They are also limited to the enforcement of violations that are prohibited in both countries.

FTC newly participates in the Global Cooperation Arrangement for Privacy Enforcement - an international multilateral arrangement open to data protection authorities globally to facilitate cross-border cooperation in the enforcement of data protection and privacy laws, including joint investigations and enforcement actions. The cooperation under this framework is, again, voluntary, but it might be useful for the DPAs to apply for participation and seek assistance with exercising their investigative powers on the U.S. territory within this framework.

Another potentially useful avenue for seeking assistance with investigations (and enforcement) from the FTC is the new EU-U.S. Data Privacy Framework (EU-U.S. DPF). It must be noted that cooperation within the EU-U.S. DPF is limited to situations when personal data are transferred to the organizations in the United States that self-certify into the program and commit

to comply with certain general principles (not with the GDPR as such). The program is administered by the U.S. Department of Commerce (DoC) and the compliance is enforced primarily by the FTC. There are a couple of instances in which the participating U.S. organizations must interact directly with the DPAs, but the enforcement is generally in the hands of the U.S. enforcement entities under the U.S. rules - the DPAs do not have any direct enforcement powers over the violators. Therefore, this regime is not relevant for enforcement of penalties already imposed by the DPAs. Both the DoC and the FTC designated dedicated points of contact to act as a liaison with DPAs for the purposes of cooperation. The FTC can enforce compliance by various means. As regards investigative powers, the FTC cannot conduct on-site inspections, but it has the power to compel organizations to produce documents and provide witness statements and may use the court system to enforce such orders in case of non-compliance. It is generally advisable for the DPAs, when considering investigating (or taking an enforcement action against) a U.S. based organization, to first check whether or not such organization participates in the EU-U.S. DPF and whether the violation falls within the scope of the regime.

Finally, there are binding international agreements on mutual legal assistance in criminal matters between the United States and the EU Member states. The assistance under these instruments is potentially available also to the DPAs, but only if the underlying GDPR violations would amount to a criminal activity.

Enforcement of Fines Imposed by DPAs outside of the EU

DPAs' decisions on imposition of administrative fines are administrative acts. There is no general duty of states to recognize and enforce foreign administrative acts. There may be international agreements about recognition of administrative acts in particular situations, but in the absence of such agreements, the recognition depends on the domestic law of the state where it is requested. The same applies to recognition and enforcement of judgments (i.e. acts of the judicial branch) confirming the penalty or adjudicating such penalties *de novo*. The rules for recognition of judgments may be also applicable for administrative decisions.

If the DPA intends to enforce a judgment or an order in a particular country, the national laws of such country must always be consulted to ascertain the specific requirements and procedures. Also, it should be ascertained whether or not there is an international treaty on recognition and enforcement of judgments/administrative decisions with that particular country.

It seems though that in most jurisdictions there is a well-established rule that foreign state's penal and revenue law and potentially even "public" law in general is not enforceable (in the absence of an international treaty). The GDPR fines would be in this category. As to the procedure, there will be differences, but the common basic requirements for recognition of foreign decisions are typically proper personal and subject matter jurisdiction, proper notice, an opportunity for a fair trial, no fraud and final and conclusive decision that does not contravene to public policy of the enforcing country.

Enforcement of Fines Imposed by DPAs in the United States

DPA's penalty decisions or any judgments confirming the penalty or adjudicating such penalties *de novo* would be with very high probability effectively unenforceable in the United States because they would be considered penal in nature and there is no statute or international agreement to authorize such recognition and enforcement.

From a practical standpoint, in cases where the entities have no establishment and assets in the EU territory and there is no likelihood that they would voluntarily comply with the penalty order, it is advisable for the DPAs to consider other enforcement actions, referring the complainants/data subjects to obtain the court decisions for compensatory damages themselves or referring the case for enforcement by the FTC or other relevant agency in the United States.

There are no relevant mutual recognition agreements in the data privacy area in force. Recognition and enforcement of foreign decisions in the United States is addressed on a state-by-state basis. There are no state laws regarding specifically recognition of foreign *administrative acts* and the court precedent is largely missing, but there is some basis to argue for analogous application of the rules for recognition and enforcement of foreign *court judgments*.

The states' rules may differ in certain aspects, but there is a generally applicable rule that courts in the United States do not recognize or enforce foreign judgments for taxes, fines, or other penalties. The courts look at the purpose of the judgment - whether it is remedial (compensatory) or penal (punitive) in nature. It is irrelevant whether the underlying law is criminal or civil. The DPAs' penalty decisions or the potential court decisions on the same matter would be clearly considered punitive in nature. The courts may theoretically still recognize such judgments based on the principle of 'comity' if they do not contravene the federal and state's public policy, but there is no known precedent recognizing foreign country *penalty* judgments based on this principle.

Enforcement of Other Actions by DPAs in the United States

The DPAs may consider enforcement actions against the violators of the GDPR other than the penalties. Such enforcement actions must essentially comply with the same requirements as foreign money judgments to be recognizable and enforceable in the United States (incl. they cannot be punitive in nature). In addition, the type of non-monetary remedy is entirely in the hands of the U.S. court.

In summary, if there should be any chance for recognition of DPA's enforcement decision, all of the following criteria should be present (yet, the prospects are uncertain at best): First, the decision must be final, conclusive and enforceable in the issuing country. Second, the proceedings at the DPA must be consistent with due process, at minimum there must be proper jurisdiction, notice and at least a genuine opportunity to contest the decision at court. Third, it cannot be a decision imposing a penalty or any form of *punishment*. It would have to be an order for something *compensatory* in nature (such as compensation for "investigative costs" that was once recognized

by Arizona state court).[6] Fourth, it should be ascertained that there is no conflict with fundamental constitutional values like freedom of expression. Fifth, although there is a good argument that administrative decisions are to be recognized in the same manner as judgments, it might still be advisable to seek declaratory judgment from court or some form of court decision confirming the administrative decision.

Relevance of U.S. Privacy Laws to Enforcement of DPA's Penalty Decisions

The existence of state or federal laws in the data privacy area would not help with the enforcement of fines imposed by DPAs in any formal way. These laws typically do not contain any specific mechanisms in this respect. The general rules on recognition and enforcement would still apply. But the shared values of privacy protection can potentially be used as an argument in the recognition proceedings and specifically when it comes to the comity or public policy argument. There might naturally be a better prospect for recognition of a decision in a state that shares the same fundamental values or if the violation underpinning such decision is materially similar to one that is included in the domestic law.

As regards the investigative powers, the DPAs will certainly have a better chance to get assistance in situations where the violation would be a violation of the local law as well. Most of the existing cooperation mechanisms even require this.

[6] For details see *infra* II.E.1.

I. THE EXTRATERRITORIALITY OF GDPR

The GDPR applies not only to processing of personal data by entities established in the EU, but by operation of Art. 3(2) it also applies to the processing of personal data by entities established outside the EU if it relates to the offering of goods or services to EU data subjects or to the monitoring of their behavior.[7] In other words, the EU law here applies outside of the EU's territory, i.e. it has 'extraterritorial' effects.[8]

From a policy standpoint, the approach to assuming jurisdiction on different grounds than a territory seems apt and justifiable since the Internet is also borderless and the data processing is nowadays mostly Internet-based. The processing of personal data on one side of the world can have harmful effects on another side of the world. Therefore, the extraterritorial reach of GDPR seems reasonable in the light of the overall objective of an effective protection of human rights.

There are two basic dimensions to extraterritoriality:[9] Legislative prescriptive jurisdiction[10] and an actual enforcement of the laws (or enforcement jurisdiction if you will).[11] The former is largely outside the scope of this Report, but it needs to be at least briefly addressed since the legality of enforcement jurisdiction is closely connected with that of the prescriptive jurisdiction.[12] For example, a renown international law professor Sir Ian Brownlie stated: "If the substantive jurisdiction is beyond lawful limits, then any consequent enforcement jurisdiction is unlawful."[13]

A. Legitimacy of Prescriptive Jurisdiction

The extraterritorial jurisdictional claims must be justified both in domestic law and international law.[14] The EU domestic law (the GDPR) expressly allows for extraterritoriality. Justification under international law is more complicated.

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[7] GDPR, art. 3(2).

[8] There are other extraterritorial aspects in the GDPR, such as regulation of international data transfers, but they are not the focus of this Report.

[9] Many commentators further distinguish adjudicative jurisdiction, but it can be also subsumed under the prescriptive jurisdiction in the broader sense, certainly for the purposes of this Report. *See, e.g.,* Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y. B. INT'L L. 145 (1972–73) (analyzing adjudicative jurisdiction solely as a form of state prescriptive jurisdiction); Christopher Kuner, *Internet Jurisdiction and Data Protection Law: An International Legal Analysis (Part 1),* International Journal of Law and Information Technology, Vol. 18, 176, 2010,12-17; Dan Jerker B. Svantesson, *The Extraterritoriality of EU Data Privacy Law – Its Theoretical Justification and Its Practical Effect on U.S. Businesses*, 50 STAN. J. INT'L L. 53 (2014), 58.

[10] I.e. "[T]he power of a State to apply its laws to cases involving a foreign element". *See* Akehurst, *supra* note 9, at 145.

[11] *See* hereto: Dr. Lena Hornkohl, *The Extraterritorial Application of Statutes and Regulations in EU Law*, Max Planck Institute Luxembourg for Procedural Law Research Paper Series, N. 2022 (1), 3.

[12] *See, e.g*., Kuner, *supra* note 9, at 13; Int'l Law Comm'n, Report to the General Assembly, U.N. Doc. A/61/10 (2006), Annex V, para. 5, stating that "the internationally valid exercise of prescriptive jurisdiction in the adoption of a law is a prerequisite for the valid exercise of adjudicative or enforcement jurisdiction with respect to that law."

[13] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (7TH ED OXFORD UNIVERSITY PRESS 2008), 311.

[14] *See* Svantesson, *supra* note 9, at 75.

1. Jurisdictional Bases under International Law

The most influential[15] case regarding the international jurisdiction is still *SS Lotus* case,[16] where the Permanent Court of International Justice in summary opined that under international law the states have "a wide measure of discretion" to apply their laws to conduct beyond their territories, yet there are some (unspecified) limits in the international law.[17] There is no clear agreement in the academic literature on what those limits are;[18] in the most general terms they are dictated by the notions of non-interference into the affairs of foreign sovereign states and reasonableness of the jurisdiction.

Accordingly, for the jurisdiction to be justified, there needs to be certain meaningful connection with the forum state.[19] There are several well-established principles of international customary law that may serve as grounds for asserting one state's jurisdiction. The most widely accepted jurisdictional bases for asserting jurisdiction are the principles of territoriality (jurisdiction is based on the fact that an act occurred within the state's territory) and personality (jurisdiction is based on nationality of the wrongdoer, i.e. an active personality principle).[20] Another, less universally accepted bases are the passive personality principle (based on nationality of a victim), the protective principle (acts committed abroad that jeopardize state's sovereignty)[21] and the 'effects' principle (conduct outside the state has effects within the state).[22]

The legitimacy of the prescriptive jurisdiction must therefore be assessed on a case by case basis.

2. Application in GDPR Art. 3(2) Context – Legitimacy of Extraterritorial Reach

[15] Yet, also criticized in the academic literature. *See, e.g.*, Kuner, *supra* note 9, at 14 and the sources cited therein.
[16] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).
[17] *See id.* at paras. 46-47.
[18] *See, e.g.* Kuner, *supra* note 9, ftn. 55, citing from Barcelona Traction, Light and Power Co Ltd (Belgium v. Spain), (1970) ICJ Reports 65, 105, "where Judge Fitzmaurice stated with regard to limits on jurisdiction that international law does '(a) postulate the existence of limits—though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State'."
[19] Svantesson states: "[I]f there is a substantial and direct connection between the state claiming jurisdiction and the person, group of people or object to whom/which the jurisdictional claim relates, such a claim is, as a consequence of the sovereignty and equality of states, permitted under international law." DAN JERKER B. SVANTESSON, PRIVATE INTERNATIONAL LAW AND THE INTERNET (KLUWER LAW INTERNATIONAL 2007), 246.
[20] *See, e.g.*, Kuner, *supra* note 9, 17-23.
[21] *See, e.g., id.* at 22. According to Kuner this principle is usually limited to criminal law and violations that endanger the security of a State and its use in data protection context would be overbroad.
[22] *See, e.g.*, Svantesson, *supra* note 9, at 79-87. Although Svantesson argues that effects principle overlaps with protective principle or passive personality principle.

Assumption of prescriptive jurisdiction over entities not established in the EU in the Art. 3(2) GDPR, which is the focus of this Report, seems to be based mainly on the 'effects doctrine/principle'.[23] Although the Recital 23 of the GDPR indicates that the underlying purpose of the Art. 3(2) is the "protection" of the individuals in the EU,[24] the 'protective principle' has been traditionally used for asserting jurisdiction in different contexts – its focus is protection of states not individuals. Given that the Art. 3(2) does not apply to 'residents' of the EU, but to "data subjects who are in the Union,"[25] it cannot be concluded that the jurisdiction would be based on the passive personality principle (which is yet controversial too).

The 'effects principle' has been criticized as too open-ended (everything has effects on everything these days),[26] which may cast doubt on the reasonableness of the jurisdiction. The effects-based jurisdiction should be limited to conduct that has "a substantial effect" within the territory of the prescribing state.[27] It is an accepted ground for prescriptive jurisdiction also in the U.S. customary law as articulated in the Restatement[28] (Fourth) of the Foreign Relations Law of the United States: "International law recognizes a state's jurisdiction to prescribe law with respect to conduct that has a substantial effect within its territory."[29] The effects should be substantial and there must be "a genuine connection between the conduct and the prescribing state."[30] It may be concluded that although the effects doctrine is somewhat controversial, it seems that it is widely accepted nonetheless.[31]

Art. 3(2) of the GDPR does not require that the conduct has "a substantial effect" within the EU territory. It is using the 'targeting' criterion instead. It seems unlikely that the 'targeting criterion' can be interpreted in a way that GDPR is applicable only in situations where the conduct has substantial effects within the EU territory.[32]

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[23] *See, e.g.*, Adèle Azzi, *The Challenges Faced by the Extraterritorial Scope of the General Data Protection Regulation*, 9 (2018) JIPITEC 126 para 40; Kuner, *supra* note 9, at 22.
[24] GDPR, Recital 23.
[25] GDPR, Art. 3(2).
[26] *See, e.g.*, Kuner, *supra* note 9, at 21.
[27] *See* Int'l Law Comm'n, Report to the General Assembly, U.N. Doc. A/61/10 (2006), Annex V, paras. 12, 21.
[28] In the United States "Restatements of the Law" are series of treatises that articulate the principles or rules for a specific area of law. They are secondary sources of law written by the American Law Institute (ALI) to clarify the law. Restatements synthesize and restate existing case law and statutes from various jurisdictions. Restatements are only a source of persuasive authority and do not replace precedents and controlling statutes. They often influence court decisions but are not binding on the courts in and of themselves.
[29] Restatement (Fourth) of the Foreign Relations Law of the United States §409 (AM. LAW INST. 2018).
[30] *Id.* §409 cmt. a; "Some states also regulate conduct that was intended to have, but did not have, a substantial effect within their territory." *Id*. §409 cmt. c.
[31] *See* Christopher Kuner, *Internet Jurisdiction and Data Protection Law: An International Legal Analysis (Part 2),* International Journal of Law and Information Technology, Vol. 18, p. 227, 2010, 23.
[32] *See* Guidelines 3/2018 on the territorial scope of the GDPR (Article 3), Version 2.1, 7 January 2020, 13-22 available at https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_3_2018_territorial_scope_after_public_consultation_en_0.pdf (last visited on March 15, 2024). The chapter addressing the 'targeting' criterion is silent about any requirements of "substantial effect" in the EU territory.

Despite the uncertain justification based on the traditional principles of customary international law, there are certain other arguments in favor of legitimacy of the broad jurisdictional reach. First, some commentators observe that in the data privacy area extraterritorial claims are not uncommon in the domestic laws of several other states and they thus find support for extraterritoriality based on "general principles of law recognized by civilized nations."[33] "General principles of law recognized by civilized nations" are one of the sources of international law as enumerated in the Art. 38 of the Statute of the International Court of Justice (although they are typically considered subsidiary sources to customary law and treaty law). Second, it can be argued that given that the main function of the Art 3(2) is the effective protection of the fundamental rights of individuals in the EU, the jurisdictional claim is in fact based on the 'protective principle' broadly interpreted.[34] Lastly, it can be argued that the technology changes the reality in a way that a harmful conduct for which the physical presence was necessary in the past can now occur completely remotely without such presence. Therefore, the scope of the jurisdictional claim to regulate such conduct remains the same, but due to technological developments, other situations, including those with an extra-territorial element, must be included. As an eminent U.S. Supreme Court Justice Louis Brandeis aptly noted already in 1918 in his tremendously influential dissenting opinion in *Olmstead* case when describing technological developments in governmental surveillance: "Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."[35] The similar logic has been used in several more recent U.S. Supreme Court cases, such as *Carpenter* or *Kyllo*.[36]

Any further theoretical justifications of the extraterritorial jurisdictional claims are beyond the scope of this Report and of no practical use for the DPAs.[37] We may conclude that the broad extraterritorial reach of the Art. 3(2) is controversial at best. The practical consequence may thus be a higher likelihood of refusal of such jurisdictional claim by foreign countries as unreasonable.[38]

B. Limits of Enforcement Jurisdiction

"Jurisdiction to enforce … concerns the authority of a state to exercise its power to compel compliance with law."[39] The court in *SS Lotus* case made a clear difference between the permissible territorial scope of the prescriptive and enforcement jurisdiction:

> [T]he first and foremost restriction imposed by international law upon a State is that failing the existence of a permissive rule to the contrary it may not exercise its

[33] *See* Svantesson, *supra* note 9, at 87-94; Azzi, *supra* note 23, paras. 42-45.

[34] *See* Kuner, *supra* note 9, at 22.

[35] Olmstead v. United States, 277 U.S. 438 (1928), dissenting opinion by J. Louis Brandeis, para. 60. J. Brandeis was making an argument for application of the 4th Amendment protections in cases of wiretapping by the government even without an actual physical trespass.

[36] Carpenter v. United States, 585 U.S. (2018); Kyllo v. United States, 533 U.S. 27 (2001).

[37] For a very thorough analysis, *see, e.g.,* Svantesson, *supra* note 9.

[38] Svantesson thinks that there is a clear correlation between the scope of jurisdictional claim and legitimacy of its refusal. *See* Svantesson, *supra* note 9, at 94.

[39] Restatement (Fourth) of the Foreign Relations Law of the United States, Part IV – Jurisdiction, State Immunity, and Judgements, Introductory Note (AM. LAW INST. 2018).

> power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), para 45.

There is, therefore, a significant disconnect between what the states/EU can lawfully regulate on paper and to what extent they are lawfully able to compel compliance with those regulations.

Thus, in practice, even if the expansive prescriptive jurisdiction in the GDPR could be justified from the policy and theoretical legal standpoint, the enforcement aspect remains problematic.

The problems with extraterritorial enforcement of GDPR have been foreseen early on.[40] For example, the influential US data privacy think tank The Future of Privacy Forum warned: "Geographic overexpansion will inevitably lead to unenforceability, given that the jurisdiction of EU data protection authorities does not extend beyond EU borders. Unenforceable legislation brings the law into disrepute."[41] The same skepticism regarding effective enforcement of the extraterritorial provisions persists even years after the GDPR has become fully operational. The leading expert on international data privacy law Christopher Kuner stated in 2023:

> By contrast, when the GDPR applies directly to data processing in a third country, it does so regardless of the possibility of enforcement. The GDPR grants individuals the right to lodge a complaint with a DPA (Art. 77) or a court (Art. 79) in the EU when it applies directly to a party outside the EU. This is likely to be ineffective, however, unless the non-EU party has an EU establishment, because the enforcement powers of the DPAs end at EU borders, and it is expensive and difficult to have court judgments or DPA decisions recognized and enforced in third countries.

Christopher Kuner, *Protecting EU Data Outside EU Borders under the GDPR*, 60 Common Market Law Review 77-106 (2023), 98. Kuner further states: "All this leads to the conclusion that the application of the GDPR under Article 3(2) is designed to put non-EU actors on notice that manipulating the data of EU individuals has legal consequences rather than to threaten a high risk of legal enforcement."[42] Another academic, Svantesson, calls this 'a bark jurisdiction'.[43] Both authors admit though that even practically unenforceable rules may play an important role due to reputational considerations.

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[40] *See, e.g.,* Cedric Ryngaert, *Symposium Issue on Extraterritoriality and EU Data Protection*, INT. DAT. PRIV. LAW (2015) Vol. 5, No. 4, 221, 223.
[41] Omer Tene, Christopher Wolf, *Overextended: Jurisdiction and Applicable Law under the EU General Data Protection Regulation*, January 2013, The Future of Privacy Forum White Paper, 4.
[42] *Id.*
[43] *See* Dan Jerker B Svantesson, *A jurisprudential justification for extraterritoriality in (private) international law*, 13 Santa Clara Journal of International Law (2015), 517–571, 556.

Even the Article 29 Working Party recommended a cautious approach when applying certain EU data protection law to the processing of personal data by websites, which are based outside the EU and limit it to "cases where it is necessary, where it makes sense and where there is a reasonable degree of enforceability having regard to the cross-frontier situation involved."[44] This recommendation, however, regarded the previous EU Data Protection Directive and its Art. 4(1)(c), not the GDPR specifically. Also, such a vague recommendation transfers the burden of evaluating the possibility of enforcement in a given case onto the DPAs that do not have the capacity to do so.

The difficulties of extraterritorial enforcement will be described in detail in the Chapter II. below.

[44] Article 29 Working Party, Working document on determining the international application of EU data protection law to personal data processing on the Internet by non-EU based websites (WP 56, 30 May 2002), 9.

II. EXTRATERRITORIAL ENFORCEMENT

A. Actions of One State on a Territory of Another State under International Law

It is a well-settled norm of the public international law that one state cannot perform any official action on a territory of another state without the consent of the latter.[45] For example, Kuner states:

> International law prohibits an act by one State in the territory of another State which only State officials (as opposed to private individuals) may perform. Thus, for example, <u>a State may not carry out an investigation in another State, if the purpose is to enforce its own administrative, criminal, or fiscal law</u>. These apply even if the persons or entities in the second State consent to the first States enforcement actions. (emphasis added)

Christopher Kuner, *Internet Jurisdiction and Data Protection Law: An International Legal Analysis (Part 2),* International Journal of Law and Information Technology, Vol. 18, p. 227, 2010, 8. The principle of sovereignty and equality of states embedded in the UN Charter indeed requires such limitations.[46]

B. Exercise of DPAs' Investigative Powers Outside of the EU

This Section will examine the extent to which DPAs can exercise their investigative powers outside of the EU and specifically in the United States. It will aim to answer the following EDPB question: "*Can the DPA exercise its investigative powers outside of the EU, for example on US territory (possibly with local authorities' consent)?*"[47]

As was established above, one sovereign state cannot exercise its powers on the territory of another sovereign state without proper legal authority to do so, i.e. typically the consent of the latter (plus some legal authority within the domestic law). Accordingly, it needs to be examined whether DPAs' actions are attributable to the state, whether DPAs have legal authority to exercise those powers in the domestic (EU or national) law and whether there exists any consent on the U.S. side or how can it be obtained.

1. <u>DPAs' Legal Position</u>

DPAs are 'independent public authorities' responsible (amongst others) for monitoring the application of the GDPR.[48] For this purpose, they are equipped with various investigative and corrective powers, such as to issue a compliance order or to impose an administrative fine.[49] They

[45] *See, e.g.,* Brownlie, *supra* note 13, at 309; Tene, Wolf, *supra* note 41, at 5.
[46] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 2(1).
[47] ToR, Sec. 2.
[48] GDPR, Art. 51(1).
[49] GDPR, Art. 58.

are established by national laws of the EU member states[50] and they have (separate) public annual budgets.[51] As such, they are part of the executive branch. Therefore, their actions are attributable to the state. If they want to perform an act on a territory of a different state, rules of international law must be observed.

2. Legal Character of DPAs' Investigative Powers

The investigative powers are conferred on the DPAs by GDPR (pursuant to Article 58 (1)). Therefore, the source of the legal authority to exercise those powers is the EU law. Although the DPAs may theoretically exercise their powers against the entities not established in the EU under Art. 3(2) of the GDPR, Art. 55(1) of the GDPR is limiting "exercise of the powers conferred on [the DPA] in accordance with [GDPR] to the territory of its own Member State."[52] There is no other provision in the GDPR that would suggest that the DPA's authority to exercise its powers would expand beyond the borders of its own state.

The purpose of the above provision on exercise of the DPAs powers on the territory of its own Member State is most likely avoidance of potential jurisdictional conflicts, acknowledgement of states' sovereign powers and distribution of DPAs' competence within the EU. This view is supported also by the logical placement of this provision within the GDPR - Art. 55 *(Competence)* stipulates general distribution of competence by allocating the powers of each DPA to the territory of its own state and Art. 56 *(Competence of the lead supervisory authority)* stipulates exceptions from this general rule in cases of cross-border data processing. Also, the investigative powers under Art. 58 of the GDPR include for example powers to do data protection audits or obtain access to the premises of the data controllers or processors. It is clearly prohibited under international law to exercise those powers on the territory of another sovereign state. In that sense the authority to do so under the domestic law is just a starting point.[53]

On the other hand, to interpret provision of Art. 55 or other GDPR articles as prohibiting the DPAs to use their investigative powers outside the territory of their state in situations when it is legal from the international law standpoint, such as with the consent of that foreign state, would seem to be too restrictive. That would in fact exclude the possibility of international cooperation in the area of investigation and enforcement and that is clearly not the legislator's intent. The relevant recital of the GDPR only confirms as much by stressing the need for cross-border cooperation to carry out investigations:

> [S]upervisory authorities may find that they are unable to pursue complaints or conduct investigations relating to the activities outside their borders. Their efforts to work together in the cross-border context may also be hampered by insufficient preventative or remedial powers, inconsistent legal regimes, and practical obstacles like resource constraints. Therefore, there is a need to promote closer cooperation

[50] GDPR, Art. 54 (1)(a).
[51] GDPR, Art. 52 (6).
[52] GDPR, Art 55 (1).
[53] The discussion in the EDPB Enforcement Study on this issue (p. 14), therefore, lacks the gist of the issue – the authority under international law.

> among data protection supervisory authorities to help them exchange information and carry out investigations with their international counterparts. For the purposes of developing international cooperation mechanisms to facilitate and provide international mutual assistance for the enforcement of legislation for the protection of personal data, the Commission and the supervisory authorities should exchange information and cooperate in activities related to the exercise of their powers with competent authorities in third countries, based on reciprocity and in accordance with this Regulation.

GDPR, recital 116. In practice, there have been already examples of audits performed by DPAs on a territory of a foreign state with the consent of that state's governmental authority.[54]

Yet, as noted above, even if there is a legal authority for the exercise of the DPAs' investigative powers under the domestic law (EU/national), the main issue is whether they have an authority under international law, i.e. the consent of the respective foreign state.

3. Consent of a Foreign State

It follows from the above analysis that any actions of DPAs for the purposes of regulatory compliance outside of the EU territory without the respective state's consent would appear to be a breach of international law.[55] Even the potential consent of the (private) entities established outside of the EU, e.g. in model contracts, would not be sufficient to make extraterritorial exercise of DPAs' powers legal under international law because the consent of the state under whose jurisdiction it falls is needed.[56]

As a consequence, there seems to be no realistic chance of the enforcement of data privacy laws against non-EU entities with no assets within the EU borders without some meaningful cooperation from the country where such entities are established.[57]

The consent of a state and the cooperation tools may be included in an international agreement that is binding or acquired on a case by case basis. Especially relevant in the area of data privacy are also so called 'soft law' agreements that are non-binding, but can still be useful.

4. International Cooperation with the United States - Exercise of DPAs' Investigative Powers in the United States

a) International Agreements

The international agreements may be either multilateral or bilateral, and they might allow for various forms of international cooperation. Note that cooperation opportunities within the new

[54] *See* Kuner, *supra* note 31, at 9-10.
[55] *See, eg.,* Akehurst, *supra* note 9, at 147.
[56] *See* Kuner, *supra* note 31, at 24 and the authorities referred to therein.
[57] *Id.* at 12; JACK GOLDSMITH AND TIM WU, WHO CONTROLS THE INTERNET? (OXFORD UNIVERSITY PRESS 2008) 175, 159.

EU-U.S. Data Privacy Framework will be analyzed separately at the end of this Report since they are relevant both for investigations and for the actual enforcement actions.

(1) Agreements on Mutual Legal Assistance

There is a framework Agreement on mutual legal assistance between the European Union and the United States from 2003 ("MLA") and then there are bilateral mutual legal assistance agreements between the United States and the individual EU Member states. These agreements, however, provide for cooperation on criminal matters only.

There is a possibility of the mutual legal assistance to the administrative authorities envisaged in the MLA.[58] However, this assistance is limited to the situations when the conduct under investigation will lead to a criminal prosecution or to a referral to criminal investigation or prosecution authorities.[59] And the MLA specifically provides that: "Assistance shall not be available for matters in which the administrative authority anticipates that no prosecution or referral, as applicable, will take place."[60]

It follows from the above that the assistance under these instruments would be potentially available to the DPAs, but only if the underlying GDPR violations would amount to a criminal activity.[61]

(2) Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

For the sake of completeness, the existence of a Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2 July 2019 should be mentioned. This Convention entered into force for the EU Member states in September 2023. The United States signed it on 2 March 2022, but not ratified it yet, so it has not yet entered into force there (and there is no indication that it would happen any time soon).

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[58] Agreement on mutual legal assistance between the European Union and the United States of America (2003), Art. 8.

[59] *Id.*

[60] *Id.*

[61] Under the framework MLA there is no requirement that the conduct needs to be criminal in the requested state. But it is advisable to always check the respective bilateral agreement since their wordings differ. Some of them do not have any provision on that (e.g. MLA between the United States and the Netherlands). Some of the bilateral agreements explicitly state that the assistance should be provided "without regard to whether the conduct that is the subject of the request would constitute an offense under the laws of the Requested State." (Art. 1(3) of the Treaty between the United States of America and the Republic of Poland on Mutual Legal Assistance in Criminal Matters, July 10, 1996). Some of them further qualify such statement: "The Requested State shall provide assistance without regard to whether the conduct that is the subject of the request would constitute an offense under the laws of the Requested State, except that the Requested State may refuse to comply in whole or in part with a request for assistance to the extent that the conduct would not constitute an offense under its laws and the execution of the request would require a court order." (Art. 1(3) of the Treaty between the United States of America and the Czech Republic on Mutual Legal Assistance in Criminal Matters, February 4, 1998).

However, this Convention seems to be of no use for the DPAs' investigative actions or for enforcement of penalties.[62] It applies to both monetary and non-monetary judgments rendered by a court in a civil or commercial matter, but it specifically excludes administrative matters[63] and also the matters of "privacy".[64] It is not quite clear what is meant by "privacy". Once (and if) it is ratified by the United States, it may be theoretically relevant for recognition and enforcement of judgments awarding civil damages to data subjects for GDPR violations (unless they would be excluded within the notion of "privacy").

b) 'Soft law' Agreements and Cooperation

Same as binding international agreements, the 'soft law' instruments may be multilateral or bilateral. The main difference is that the 'soft law' instruments are not legally binding.

There is no central federal data protection authority in the United States. Given the sectoral approach, there are many federal statutes regulating data privacy in specific areas (such as healthcare or education) and those statutes provide for different type of enforcement by different agencies. The Federal Trade Commission (FTC) is the only federal regulatory and enforcement agency that deals with consumer protection issues (incl. data privacy) in broad sectors of economy. In parallel to the federal regime, there are state-level statutes protecting a wide range of privacy rights and corresponding state-level enforcement mechanisms.

If the DPA seeks cooperation from a governmental authority on the U.S. territory, various aspects must be considered, such as the character of the GDPR violation, connections to a specific state etc. The FTC, however, is the most important regulator in the data privacy area.

(1) Memoranda of Understanding with FTC

The FTC has entered into several Memoranda of Understanding (MoAs) with data protection regulators regarding mutual assistance in the enforcement of data protection laws. Relevant to some DPAs of the EU Member states, there is a bilateral MoA with the NL DPA and the Irish DPA.[65] For the sake of completeness, there is also a multilateral MoA Among Public Authorities of the Unsolicited Communications Enforcement Network Pertaining to Unlawful Telecommunications and Spam (September 2023) and Multilateral Memorandum of Understanding For Participation In the Global Privacy Enforcement Network System (October 2015).

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[62] Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 (last visited Feb. 6, 2024)

[63] *Id.*, Art. 1(1).

[64] *Id.*, Art. 2(1)l).

[65] Memorandum of Understanding between the United States Federal Trade Commission and the Dutch Data Protection Authority on Mutual Assistance in the Enforcement of Laws Protecting Personal Information in the Private Sector (July 2019); Memorandum of Understanding between the United States Federal Trade Commission and the Office of the Data Protection Commissioner of Ireland on Mutual Assistance in the Enforcement of Laws Protecting Personal Information in the Private Sector (June 2013).

All these MoAs provide for various cooperation measures in the enforcement of data protection laws. MoAs are a clear example of a soft law instrument, i.e. the provisions are not legally binding and any kind of cooperation is essentially rendered on a voluntary basis. The scope of the cooperation can be, however, limited at the outset – such as e.g. the MoA with the Dutch DPA is limited to the enforcement of violations that are prohibited in both countries.[66] In practice, it seems that the cooperation would be rendered only if there is an overlap between the GDPR and the respective U.S. legal regulation.

(2) Global CAPE

On October 16, 2023 Global Cooperation Arrangement for Privacy Enforcement (Global CAPE)[67] was established under the umbrella of the Global Cross-Border Privacy Rules Forum.[68] It is an international multilateral arrangement open to data protection authorities globally to facilitate cross-border cooperation in the enforcement of data protection and privacy laws, including joint investigations and enforcement actions. All regulators can apply to participate in Global CAPE - participation is not limited to data protection authorities of Global CBPR Forum members or associates.

In January 2023 the FTC has agreed to participate in Global CAPE. Although this is a very new cooperation tool that has likely not yet been much tested in practice, it is advisable for the DPAs to apply for participation in the Global CAPE and try to make use of the cooperation tools with FTC available under the framework. It seems to be a useful way in which to exercise their investigative powers on the U.S. territory.

There are various ways of cross-border cooperation between data protection authorities envisaged under Global CAPE such as information sharing, rendering mutual assistance, joint investigations or exchanging staff. Under Global CAPE Art. 1.3:

> "[t]he goals of the Global CAPE are to:
>
> • facilitate information sharing among Participants;
>
> • establish mechanisms to promote effective cross-border cooperation between Participants on the enforcement of Data Protection and Privacy Laws as well as the

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[66] *See* Memorandum of Understanding between the United States Federal Trade Commission and the Dutch Data Protection Authority on Mutual Assistance in the Enforcement of Laws Protecting Personal Information in the Private Sector (July 2019), Sec. I B): "'Covered Privacy Violation' means practices that would violate the Applicable Privacy Laws of one Participant's country and that are the same or substantially similar to practices prohibited by any provision of the Applicable Privacy Laws of the other Participant's country."

[67] https://www.globalcbpr.org/wp-content/uploads/Global-CAPE-2023.pdf

[68] Global Cross-Border Privacy Rules Forum was established via the 2022 Global CBPR Declaration. It seeks to support the free flow of data by providing an interoperable mechanism for effective data protection and privacy globally. The current members and associates (as of January 17, 2024) are: Australia, Canada, Japan, Republic of Korea, Mexico, Philippines, Singapore, Chinese Taipei, USA, UK. For further information see https://www.globalcbpr.org/ (last accessed on February 25, 2024).

Global CBPR Framework, including through referrals of matters and through parallel or joint investigations or enforcement actions; and

• encourage information sharing and cooperation on data protection and privacy investigation and enforcement with Non-Participating Authorities, including by ensuring that the Global CAPE can work seamlessly with similar arrangements, frameworks and networks."

The formal "Requests for Assistance"[69] appear to be particularly useful. Cooperation within this framework is not expressly limited to violations that are prohibited in both countries, but the Requests for Assistance can be declined for example if "the matter is inconsistent with domestic law or policy," if "the matter is not within the Participant's scope of authority or jurisdiction," or if "there is an absence of mutual interest in the matter in question."[70]

It should be emphasized, though, that this framework operates on a completely voluntary basis and it does not create any binding obligations for the participants.

c) International Cooperation with California

California is the only state in the United States with an independent agency that specializes in data privacy protection - the California Privacy Protection Agency ("CPPA"). The CPPA has the power to cooperate with other privacy enforcement agencies in the state, as well as in "other states, territories, and countries."[71] There are no other provisions in the CCPA on an international cooperation.

There are no formal cooperation agreements in place, but it is advisable for the DPAs to reach out to the CPPA to coordinate their investigatory and enforcement actions against entities that are within the CPPA's reach.

5. Conclusion

The DPA can exercise its investigative powers outside of the EU (e.g. in the United States) only with the consent of the respective foreign governmental authority. Such consent may be sought under the existing cooperation regimes or it can be rendered outside of those regimes on a case by case basis.

C. Recognition and Enforcement of Foreign Judgments

This section of the Report aims to tackle the following EDPB/NL DPA questions:

[69] Global CAPE Art. 8.
[70] Global CAPE art. 6.
[71] California Consumer Privacy Act (2018), as amended by California Privacy Rights Act (2020), Sec. 1798.199.40 (i).

"1) Can the NL SA bring legal proceedings with a Dutch decision that is established in court (after appeal or failure to lodge an objection/appeal), or are they not recognized at all?

2) Is it of interest whether or not violations of the GDPR (e.g. Article 27 GDPR) are to be regarded as criminal/civil offences? If so, how should an administrative fine of the NL SA be considered?

3) Can the NL SA take legal action and collect/fine outside the Netherlands (for example in the US)? If so, what is needed for that?"[72]

There is a distinction between recognition and enforcement of foreign judgments, i.e. acts of the judicial branch, and administrative decisions, i.e. acts of executive branch of the government. DPAs' penalty decisions are clearly the latter, but since the EDPB is also interested in recognition of decisions established in court and since the rules may be applicable *mutatis mutandis* for administrative decisions, recognition and enforcement of judgments will be analyzed first.

Given the overall purpose of this Report, i.e. examining the possibility of enforcement of GDPR fines outside of the EU, the main focus of this section will be judgments for administrative fines. However, to provide the DPAs with the more comprehensive picture and for the sake of completeness, the general rules for recognition of other types of judgments will be also described and analyzed.

1. General Principles of Recognition and Enforcement

Recognition and enforcement of foreign judgments is generally a matter of domestic law of every sovereign state. Therefore, this section of the Report will only summarize certain general principles which commonly apply in civilized countries throughout the world. If a DPA (or a private party) intends to enforce a judgment or an order in a particular country, the national laws of such country must always be consulted to ascertain the specific requirements and procedures. Also, it should be ascertained whether or not there is an international treaty (bilateral or multilateral) on recognition and enforcement of judgments binding for that particular country.

First of all, given the purpose of this Report, it should be noted that it seems that in most jurisdictions there is a well-established rule that foreign state's penal and revenue law and potentially even "public" law in general is not enforceable.[73] Rule 3 of the leading English law book on the private international law - Dicey, Morris & Collins, The Conflict of Laws - stipulates: "English courts have no jurisdiction to entertain an action: (1) for the enforcement, either directly

[72] ToR, Sec. 2.

[73] *See, e.g.,* Benjamin Greze, *The extra-territorial enforcement of the GDPR: a genuine issue and the quest for alternatives*, International Data Privacy Law, 2019, Vol. 9, No.2, 109 – 128, 115; *But cf.* Restatement (Fourth) of the Foreign Relations Law of the United States §489 Rpt's Note 4 (AM. LAW INST. 2018): "Although some authorities outside the United States have extended the rules against enforcing foreign tax and penal laws to other "public laws," see Dicey, Morris & Collins on the Conflict of Laws 107-108 (15th ed. 2012) […], no U.S. cases extend a rule of nonrecognition to public laws generally. *But cf. Reynolds Tobacco Holdings*, 268 F.3d at 132 (observing in dictum that "United States courts have traditionally been reluctant to enforce foreign laws that are 'jure imperii.'")."

or indirectly, of a penal, revenue or other *public law* of a foreign state; or (2) founded upon an act of state.[74] (emphasis added) Further details and how does this rule applies in the United States with regard to GDPR fines will be analyzed below in section 2. of this sub-chapter.

Generally, there will be differences in the procedure in common law countries and civil law countries, but the common basic requirements for recognition will be that the rendering court had proper personal and subject matter jurisdiction, gave the defendant proper notice, there has been an opportunity for a fair trial before an impartial tribunal, there was no fraud in procuring the judgment and the judgment is final and conclusive and does not contravene to public policy of the enforcing country.[75]

However, there are varied concepts of jurisdiction across the countries and there will be thus differences in what the courts consider *proper jurisdiction*. This is also a point where the potentially overbroad extraterritorial prescriptive jurisdictional reach of GDPR may prove problematic.[76] Similarly, there will be differences in the requirements for *proper notice.* The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters[77] codifies accepted procedures for service of process in civil or commercial matters among its signatories, but not all countries are parties to this convention in which case the local rules must be observed. As regards the "contravention of public policy" - this ground for non-recognition is usually interpreted narrowly, but it may be important if the judgment somehow conflicts with the other state's fundamental values (such as freedom of speech in the United States).[78] In addition, some countries require reciprocity as a prerequisite to enforcement.[79]

2. Recognition and Enforcement of Foreign Judgments in the United States

A plaintiff seeking to *enforce* a foreign judgment within the United States must first have the judgment *recognized* by a domestic court (to bring an action to a court that has adequate basis to exercise jurisdiction). *Recognition* of a foreign judgment is in essence its domestication.[80] Once recognized, the foreign judgment becomes equal to a judgment produced by a U.S. court and enforceable in the same manner under the same rules and procedures.[81]

[74] DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS (15TH EDN, SWEET AND MAXWELL 2012) PARA 5-R019.
[75] For details *see, e.g.,* Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, BERKELEY JOURNAL OF INTERNATIONAL LAW, VOL. 31:1, 2013, 150-205, 162-168 and the authorities referred therein; Joseph J. Simeone, "*The Recognition and Enforceability of Foreign Country Judgments*", 37 ST. LOUIS U. L.J. 341 (1992-1993), 343-345.
[76] *See also,* Greze, *supra* note 73, at 122.
[77] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
[78] *See* Greze, *supra* note 73, at 121.
[79] *See* Zeynalova, *supra* note 75, at 166.
[80] *See, e.g.,* Zeynalova, *supra* note 75, at 155.
[81] *See, e.g.,* Restatement (Fourth) of the Foreign Relations Law of the United States §486 (AM. LAW. INST. 2018).

a) Sources of Law

The United States has not adhered to any multilateral or bilateral treaty that governs the recognition or enforcement of foreign (i.e. non-U.S.) court judgments (it is a signatory of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2 July 2019, but it has never ratified it).[82] The full faith and credit clause of the federal Constitution requires recognition of other state court judgments, but that clause does not apply to foreign court judgments.[83]

There is no general federal law governing the recognition or enforcement of foreign judgments. Therefore, recognition and enforcement of foreign judgments in the United States is typically addressed on a state-by-state basis.[84]

There are two relevant uniform acts[85] that provide for recognition and enforcement of foreign country judgments in a state court in the United States: The Uniform Foreign Money-Judgments Recognition Act ("UFMJRA") of 1962 and its updated version from 2005.[86] The 2005 UFMJRA has been adopted by 29 states (incl. California, Delaware and New York) and the District of Columbia, 9 other states and the U.S. Virgin Islands adopted the 1962 version only (the remaining states address recognition and enforcement issues through common law principles reflected in case law; such case law is synthetized in so called Restatement of the Foreign Relations Law[87]). However, those two versions of UFMJRA do not differ dramatically[88] and they both include the same limitations – they apply only to final, conclusive and enforceable judgments to pay money and they specifically exempt "judgments for taxes, a fine or other penalty."[89] The same in general applies also to the states that have not adopted any version of the UFMJRA and that follow common law principles.[90]

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[82] For details see *supra* Section II.B.4.a)(2).

[83] U.S. Const. Art. IV, Sec.1; *see also* Restatement (Fourth) of the Foreign Relations Law of the United States §481 cmt. h) (AM. LAW. INST. 2018).

[84] *See* Restatement (Fourth) of the Foreign Relations Law of the United States §481 cmt. a (AM. LAW. INST. 2018): "The recognition and enforcement of foreign judgments in the United States are generally governed by State law."

[85] There are many uniform acts in the U.S. in various areas. The Uniform Law Commission website states: "Uniform act is one that seeks to establish the same law on a subject among the various jurisdictions. An act is designated as a "Uniform" Act if there is substantial reason to anticipate enactment in a large number of jurisdictions, and uniformity of the provisions of the act among the various jurisdictions is a principal objective." See https://www.uniformlaws.org/acts/overview/uniformacts (last accessed on Jan. 29, 2024).

[86] For details and current information on UFMJRA see Uniform Law Commission website at https://www.uniformlaws.org/committees/community-home?CommunityKey=ae280c30-094a-4d8f-b722-8dcd614a8f3e.

[87] For clarification see *supra ftn.* 28.

[88] According to Uniform Foreign Money-Judgments Recognition Act (2005), Prefatory Note: "This Act continues the basic policies and approach of the 1962 Act. Its purpose is not to depart from the basic rules or approach of the 1962 Act, which have withstood well the test of time, but rather to update the 1962 Act, to clarify its provisions, and to correct problems created by the interpretation of the provisions of that Act by the courts over the years since its promulgation."

[89] Uniform Foreign Money-Judgments Recognition Act (2005), Sec. 3(b) (1),(2).

[90] *See* Restatement (Fourth) of the Foreign Relations Law of the United States §481 (AM. LAW. INST. 2018).

b) Penal Judgments

According to the Comment to Sec. 3(b) of the 2005 UFMJRA: "Foreign-country judgments for taxes and judgments that constitute fines or penalties traditionally have not been recognized and enforced in U.S. courts." Reference is also made to Restatement (Third) of the Foreign Relations Law of the United States (1987) §483: "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states." The newest version of the Restatement from 2018 is even more explicit when instead of stating that "[c]ourts are *not required* to recognize" stipulates: "Courts in the United States do not recognize or enforce judgments rendered by the courts of foreign states to the extent such judgments are for taxes, fines, or other penalties, *unless authorized by a statute or an international agreement* (emphasis added)."[91] As regards the rationale for the exclusion of tax judgments and judgments constituting fines or penalties from the scope of the Act, both "seem to be grounded in the idea that one country does not enforce the public laws of another."[92] Another justifications offered by courts are along the same lines – the courts should avoid furthering the governmental interests of a foreign sovereign or abstain from public-policy review of foreign laws not to offend the foreign state.[93]

However, Sec. 11 (Saving Clause) of the 2005 UFMJRA explicitly provides that "This [act] does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this [act]." Therefore, the courts may theoretically recognize such judgments based on comity or other principles.[94] The concept of comity will be discussed below.

Another important question may arise in this context – what is a judgment for a fine or penalty? The courts generally look at its purpose - whether the purpose is remedial in nature, with its benefits accruing to private individuals, or penal in nature, punishing an offense against public justice.[95] The Restatement (Fourth) of the Foreign Relations Law of the United States §489 comment b) defines penal judgments by citing to a seminal U.S. Supreme Court case in the area *Huntington v. Attrill*[96] as one whose "purpose is to punish an offence against the public justice of the State" rather than "to afford a private remedy to a person injured by the wrongful act."[97] "Judgments for fines, penalties, and forfeitures are within this Section."[98] On the other hand,

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[91] *Id.* §489.
[92] Uniform Foreign Money-Judgments Recognition Act (2005), Comment to Sec. 3(b).
[93] *See* Restatement (Fourth) of the Foreign Relations Law of the United States §489 Rpt's Note 2 (AM. LAW INST. 2018).
[94] Uniform Foreign Money-Judgments Recognition Act, Sec. 3(b) cmt. (UNIF. LAW COMM'N 2005).
[95] *See, e.g.*, Uniform Foreign Money-Judgments Recognition Act, Sec. 3(b) cmt. (UNIF. LAW COMM'N 2005) referring to Chase Manhattan Bank, N.A. v. Hoffman, 665 F.Supp 73 (D. Mass. 1987) and U.S.-Australia Free Trade Agreement, art.14.7.2, U.S.-Austl., May 18, 2004; Restatement (Third) of the Foreign Relations Law of the United States (1987) §483 cmt. d) (Other fiscal judgments): "A foreign judgment may involve a revenue or fiscal claim even though it is neither a penal nor a tax judgment. Whether a judgment in favor of a foreign state or state instrumentality is a civil judgment entitled to recognition, or a judgment for a fine not entitled to recognition, depends on the purpose of the claim and on the law on which it is based."
[96] Huntington v. Attrill, 146 U.S. 657, 673-674 (1892).
[97] Restatement (Fourth) of the Foreign Relations Law of the United States §489 cmt. b) (AM. LAW INST. 2018).
[98] *Id.*

"judgment in favor of a foreign state arising out of a contract, tort, loan guaranty, or similar civil controversy is not penal for the purposes of this Section. Nor is a judgment in favor of a foreign state awarding restitution for the benefit of private persons. So long as the purpose of the judgment is to afford a private remedy, enforcement is not barred [...]."[99] The previous version of the Restatement made a similar distinction: "A penal judgment, for purposes of this section, is a judgment in favor of a foreign state or one of its subdivisions, and *primarily punitive rather than compensatory* in character.[100] (emphasis added) In addition, it directly admitted applicability of the same rule to governmental decisions: "Actions may be penal in character, however, and therefore governed by this section, even if they do not result from judicial process, for example when a government agency is authorized to impose fines or penalties for violation of its regulations."[101]

To summarize the above, the most important consideration is the substance of the claim and whether the purpose of the award is to punish a harm against the public or to compensate persons injured by the harmful conduct. It is irrelevant whether the underlying law is criminal or civil and it is irrelevant whether the judgment is in favor of the private individual or a foreign state.

See the section II.E.4. of this Report for practical application of this analysis by court in the *Yahoo* case.

If we assess the DPAs' penalty decisions or the potential court decisions on the same matter in the context of the above rules, it seems inevitable that they would be considered punitive in nature (rather than compensatory) and therefore they would likely not be recognized and enforced based on the Uniform Foreign Money-Judgments Recognition Acts. The only (highly theoretical) option is therefore Sec. 11 and recognition based on comity or some other principle.[102]

c) The principle of 'comity' in the U.S. jurisprudence

As mentioned above, foreign judgments may be recognized by courts in the United States based on the principle of comity, although they are out of the scope of the Uniform Acts. However, there is no known precedent recognizing foreign country *penalty* judgments under general principles of comity and for the below reasons it seems largely inapplicable in these cases.

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[99] *Id.*

[100] Restatement (Third) of the Foreign Relations Law of the United States §483, cmt. b (AM. LAW INST. 1987).

[101] *Id.* The newer version of the Restatement does not include this sentence, but it provides for applicability of the same rules for administrative determinations in §489 Reporter's Note 6.

[102] *See* Uniform Foreign Money-Judgments Recognition Act, Sec. 3(b) cmt. (UNIF. LAW COMM'N 2005).

The principle of comity is a rather vague principle that has been criticized as a basis for a rule.[103] It is more a principle of mutual respect then an obligation. A seminal U.S. Supreme Court decision in *Hilton v. Guyot*[104] proposes that

> [comity] in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). The Court in *Hilton* conditioned recognition and enforceability of foreign judgments upon reciprocity and some of the courts adopted this view, but most courts rejected it.[105] Even if reciprocity is not required, the judicial decisions generally adhere to all the other requirements of the comity analysis in *Hilton* case (that are also followed in the Uniform Foreign Money-Judgments Recognition Acts), i.e. generally whether the rendering court had personal and subject matter jurisdiction, whether there was due process and proper service of process, whether there was impartial system of justice and whether the judgment was not obtained by fraud.[106] The following section of this sub-chapter provides more details.

Another federal U.S. court opined: “[Comity] does not require [recognition], but rather forbids it, when such a recognition works as direct violation of the policy of our laws, and does violence to what we deem the rights of our own citizens.”[107] It could possibly be argued *a contrario* that in cases where the foreign decision is in fact in line with the policy of the respective U.S. state’s laws then the comity requires their recognition in that state.

Courts in the United States regularly recognize as a matter of comity foreign judgments that determine a legal controversy (i.e. not money-judgments), such as declaratory judgments or judgments determining the status of persons or interests in property.[108] It seems that this is the purpose of the Savings Clause of the Uniform Acts (rather than allowing for recognition of foreign penalty decisions). Also given that the Uniform Acts explicitly exclude ‘penal’ judgments from recognition, it seems unlikely that the courts would recognize them based on ‘comity’ (yet, they are still free to do so).

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[103] *See, e.g.*, John C. Reitz, “*Recognition of Foreign Administrative Acts*”, 62 AM. J. COMP. L. 589, 605 and the authorities cited therein.

[104] Hilton v. Guyot, 159 U.S. 113 (1895). This decision is a leading federal case on recognition and enforcement of foreign judgments and it formulates principles that have been essentially later codified in the 1962 Uniform Foreign Money-Judgments Recognition Act.

[105] *See* Joseph J. Simeone, “*The Recognition and Enforceability of Foreign Country Judgments*”, 37 ST. LOUIS U. L.J. 341, 349-352 (1992-1993) and the cases cited therein.

[106] *Id.* at 352.

[107] De Brimont v Penniman, 7 F Cas 309 (CCSDNY 1873).

[108] *See* Restatement (Fourth) of the Foreign Relations Law of the United States §481cmt. c (AM. LAW INST. 2018),

To conclude, there is a theoretical possibility of recognition and enforcement of penalty judgments based on comity, but in the light of the above analysis (and the below analyzed case law) it seems highly unlikely.

d) Summary of Requirements and Procedures to Obtain Recognition of Judgments in the United States

Although it seems improbable that the judgments for penalties would get recognized in the United States due to the penalties exemption, the other general requirements for recognition will be summarized here nonetheless for the sake of completeness.[109] It may be useful for the DPAs to have the full picture and perhaps they might consider taking an enforcement action in the future (other than a penalty) that may potentially satisfy those rules. Also, these rules are generally applicable to recognition of judgments obtained by private parties; the DPAs may consider referring the complainants/data subjects to obtain the court decisions for compensatory damages themselves under circumstances.

There is in fact a strong presumption in the United States in favor of recognition of foreign country judgments if the requirements are met[110] and the U.S. courts have been quite liberal in recognizing and enforcing them.[111]

First, it must be shown that the judgment is final, conclusive and enforceable in the country of origin.[112] It should be a judgment granting or denying recovery of a sum of money except judgments for taxes, penalties and in domestic matters (but other judgments may be recognized based on comity or based on statute or international agreement on the matter). The burden of proof here is on the person seeking the recognition.

There are three common mandatory grounds for denying recognition to a foreign-country money judgment: (1) it comes from a court system that is not impartial or that dishonors due process of law, (2) the foreign court had no personal jurisdiction over the defendant, or (3) the foreign court had no jurisdiction over the subject matter of the litigation. The Restatement also excludes foreign defamation judgments rendered in jurisdictions that provide less protection to freedom of speech and press than the United States (defamation is defined broadly to include any legal proceeding that seeks compensation for injury caused by speech).[113]

Further, there are number of additional non-mandatory grounds for denying recognition where the court has discretion to decide whether or not to refuse recognition based on one of these

[109] The summary will include rules contained in Uniform Acts (that generally operate the same) and the Restatement that are materially similar; there may be variations in individual U.S. states and the local law must be always consulted.
[110] *See, e.g.*, Alberta Sec. Comm'n v. Ryckman, 30 P.3d 121, 126 (Ariz. Ct. App. 2001); Barb Dawson, Nate Kunz & Andrew Hardenbrook, *Global Impact on Arizona Soil: Recognition and Enforcement of Foreign Judgments in Arizona*, 43 AZ Attorney 24-30, 24 (2007).
[111] *See, e.g.*, Ronald A. Brand, *Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments*, 74 U. PITT. L. REV. 491, 495.
[112] For this purpose, the court is looking into the laws of the rendering country.
[113] *See* Restatement (Fourth) of Foreign Relations Law of the United States §483 (c) and cmt. g (AM. LAW INST. 2018).

grounds: (1) The defendant did not receive notice of the proceedings, (2) the judgment was obtained by fraud, (3) the cause of action or the judgment is repugnant to U.S. or state public policy, (4) the judgment conflicts with another final and conclusive judgment, (5) the proceeding in the foreign court was contrary to a dispute resolution agreement between the parties, (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action. Under UFMJRA 2005 there are two additional grounds - the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment, or the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.[114] The burden of proof to establish any of these grounds is on the party resisting recognition.

As noted above, historically, some states also required reciprocity for recognition.[115] Most U.S. states today will recognize a foreign judgment even if the issuing state would not accord the same treatment to a similar U.S. judgment, but a few states make reciprocity a mandatory or discretionary ground for recognition.[116] There, a party seeking recognition must demonstrate that the rendering country would recognize the judgment of a U.S. court if the circumstances were reversed.

e) Personal Jurisdiction in the United States

The existence of proper personal jurisdiction is generally determined by examining the laws of the state in which recognition is sought (typically, so called long-arm statutes).[117]

Personal jurisdiction refers to the authority of federal or state judges to hear cases and issue decisions over the defendant. The Fourteenth Amendment guarantees "due process of law", part of which is the right not to be forced to defend oneself in courts in states to which the defendant has no meaningful "contacts, ties, or relations."[118] The U.S. Supreme Court ruled in 1945 that a tribunal's authority depends upon the corporation's "minimum contacts" with the state in which the lawsuit was brought such that the maintenance of the action would not "offend traditional notions of fair play and substantial justice."[119] Since then two categories of personal jurisdiction arose in the jurisprudence: general and specific personal jurisdiction.

General jurisdiction is the power of the court to adjudicate any claim over which the court has subject-matter jurisdiction against a defendant, regardless of where the claim arose. A defendant is subject to general jurisdiction if his contacts within the forum country are so "substantial or continuous and systematic enough that the defendant may be haled into court in the forum, even for claims unrelated to the defendant's contacts within the forum."[120] As regards

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[114] Uniform Foreign Money-Judgments Recognition Act, Sec. 4 (c) (UNIF. LAW COMM'N 2005).
[115] The court required reciprocity in the seminal case Hilton v. Guyot*,* 159 U.S. 113 (1895).
[116] Restatement (Fourth) of Foreign Relations Law of the United States, §484 (i) and cmt. k (AM. LAW INST. 2018).
[117] *See, e.g.*, Dawson, Kunz & Hardenbrook, *supra* note 110, at 26.
[118] *See* U.S. Supreme Court decision in International Shoe Company v. Washington*,* 326 U.S. 310 (1945).
[119] *Id.*
[120] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

companies, most of them will be subject to general jurisdiction only in the state of their incorporation and in the state in which they maintain their principal place of business.

Alternatively, a defendant may be subject to *specific jurisdiction* - there the focus is on the defendant's conduct within the forum state, and the lawsuit must arise from that conduct – "(1) the defendant purposefully avails himself of the privilege of conducting business in the forum; (2) the claim arises out of conducting business in the forum; and (3) the exercise of jurisdiction is reasonable."[121] There is a recent decision of the U.S. Supreme Court (*Ford* case)[122] further clarifying the concept of specific jurisdiction. The Court held that a car company that advertised, sold, and serviced a specific vehicle model within a state would have to defend a tort case (related to injury caused to a resident) arising from that vehicle model within that state. In more general terms, there is a specific jurisdiction if a company targets the forum state with its business, and its activities in the state have a "real" connection to the plaintiff's claim. However, the Court expressly stated that it was not "consider[ing] internet transactions, which raise doctrinal questions of their own."[123] Therefore, it is unclear how the question of personal jurisdiction plays out in connection with internet-based business. Without the Supreme Court precedent this is left to the lower federal courts and state courts to decide.

A jurisdictional challenge can be potentially also overcome by showing that the party is precluded from raising it before the U.S. court. For example, if a party appears before a foreign tribunal and has an opportunity to but fails to challenge its jurisdiction. In that case, there is a strong argument that it has waived the right to assert this challenge in later proceedings.[124]

The issue of proper personal jurisdiction may also prove to be problematic in cases of decisions on GDPR violations against entities not established in the EU. It will always be assessed on case by case basis, but there will always have to be some meaningful connection between the entity and the respective EU country. In cases like Locatefamily, where the only connection is (presumably) scraping of publicly available data of EU data subjects from the internet, aggregating and compiling them into files and making them available, it is highly questionable whether that would suffice to establish the necessary minimum contacts (unless the company does not voluntarily participate in the proceedings).

f) Foreign Injunctions

The DPAs may consider enforcement actions against the violators of the GDPR other than penalties. Therefore, for the sake of completeness, this section will address the issue of recognition and enforcement of injunctions and other non-monetary judgments in the United States.

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[121] *See* Dawson, Kunz & Hardenbrook, *supra* note 110, at 26, citing Shute v. Carnival Cruise Lines, 897 F.2d 377, 381 (9th Cir. 1991).
[122] Ford Motor Co. v. Montana Eighth Judicial District Court, 592 U.S. ___ (2021).
[123] *Id.*
[124] *See,* Dawson, Kunz & Hardenbrook, *supra* note 110, at 26.

The Uniform Acts only apply to monetary judgments, "but courts in the United States regularly accord recognition to foreign nonmoney judgments as a matter of comity."[125] (emphasis added) As regards the standards for recognition, "a court in the United States will apply the same general criteria as it would to a foreign money judgment."[126] That includes nonrecognition of judgments that can be deemed a penalty (rather than a compensation). However, what type of remedy (other than awarding the damages) will be granted as a result of recognition of the foreign judgment depends on the enforcing court's law, not on that of the rendering court.[127] "A court in the United States may provide injunctive relief to enforce a foreign judgment it has recognized, but the fact that a foreign court has done so does not play a decisive role in the U.S. court's choice of remedy."[128] The enforcing court simply needs to have authority under its own law to provide the relief requested (e.g. the U.S. courts do not issue asset freeze orders in advance of final judgment in the foreign litigation since they typically do not have an authority to do so under domestic law).

To conclude, the enforcement actions originating in the EU, for money or other, must essentially comply with the same requirements to be recognizable and enforceable in the United States. But in addition, the type of non-monetary remedy is entirely in the hands of the U.S. court.

D. Recognition and Enforcement of Foreign Administrative Acts

As noted above, administrative decisions are acts of the executive branch of the government. "[T]here is no general duty of States emanating from public international law to recognize each and every foreign legislative or administrative act."[129] States can make international agreements about recognition of administrative acts in particular situations.[130] In the absence of such agreements, the recognition depends on domestic law.

1. Recognition and Enforcement of Foreign Administrative Acts in the United States

The legal regime governing recognition of foreign administrative acts in the United States varies depending on whether such acts are covered by some mutual recognition agreement (multilateral or bilateral). The obligations from such agreements are then typically implemented internally in the form of a statute or regulation. If no such agreement exists, recognition depends on the common law.

[125] Restatement (Fourth) of Foreign Relations Law of the United States, §488 cmt. a (AM. LAW INST. 2018).
[126] *Id.* cmt. b.
[127] *Id.* cmt. c.
[128] *Id.*
[129] Matthias Ruffert, *Recognition of Foreign Legislative and Administrative Acts*, The Max Planck Encyclopedia of Public International Law (Article last updated January 2021), 6, at https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1087 (last viewed on February 23, 2024).
[130] *See id.* Part C.

There is no relevant mutual recognition agreement in the data privacy area. Therefore, any potential recognition of DPAs' penalty decisions and other acts depends on the respective common law. "[T]here is a basis to argue for a common law rule of recognition for foreign administrative acts modelled on analogous rules of recognition for foreign court judgments and domestic administrative orders."[131] An argument for analogous application of rules for recognition of judgments can be also find in the Restatement (Fourth) of the Foreign Relations Law of the United States (2018), §481 Reporter's Note No. 6 that is titled "*Administrative determinations*": "A handful of State-court decisions have indicated that a final, conclusive, and enforceable administrative determination can be eligible for recognition if the administrative body employed proceedings generally consistent with due process, at least if the person opposing recognition had an opportunity to obtain judicial review." Similarly, the 2005 Uniform Act, § 2(2) comment 3 provides that "any competent government tribunal that issues such a 'judgment' comes within the term 'court' for purposes of this Act."

The cases that would include even just seeking recognition of foreign administrative acts seem to be extremely rare. In the situation where the precedent is largely missing and based on the above analysis, it seems that the analogous application of the rules for recognition and enforcement of foreign judgments is quite plausible and probable. This argument can also be supported by the use of legal reasoning *a maiore ad minus* (i.e. if the rule is true on a larger or more important scale it is by analogy true also on smaller or less important scale).

If we follow this line of argument, the rules and requirements for recognition of foreign judgments (as analyzed above) apply *mutatis mutandis* for recognition of foreign administrative acts (including DPAs' administrative orders).

E. Analysis of Relevant U.S. Case Law

It should be first noted that the U.S. courts are only bound by their own previous decisions, previous decisions of the higher courts within their jurisdictional border (i.e. higher state courts of the same state or higher federal courts in the same circuit, as applicable) and decisions of the U.S. Supreme Court. However, courts very often seek guidance from nonbinding (persuasive) precedent for them and follow them, especially when mandatory precedent does not exist. The courts compare and contrast the facts of the cases and they are not required to follow even the mandatory precedent if the facts are substantially different from the facts of the prior case. The court may also overrule the precedent under certain circumstances, e.g. if the public policy changes over time.

[131] Reitz, *supra* note 103, at 602.

1. Alberta Sec. Comm'n v. Ryckman

The most relevant court decision cited in the Restatement[132] that deals with an administrative decision for a sum of money owed to a governmental agency is Alberta Sec. Comm'n v. Ryckman, 30 P.3d 121 (Ariz. Ct. App. 2001). There, the state court in Arizona recognized a Canadian court judgment confirming administrative determination of money owed to a governmental agency. In this case, the Alberta Securities Commission (ASC) investigated an alleged securities fraud and following series of hearings found that Mr. Ryckman committed securities fraud. ASC prohibited him from trading etc., but there was no penalty imposed. ASC also filed a certified administrative order with the Canadian court imposing nearly $500,000 in investigative costs[133] on Mr. Rykman. (Under the applicable Canadian law these orders are considered to be equivalent to a judgment from the Court of the Queen's Bench.) The Arizona court recognized the Canadian judgment based on the principles of comity.[134] The court, referring to the Restatement (Third), opined that there is a strong presumption of the validity of a foreign money judgment unless some exceptions apply, such as when the judicial system in question does not provide impartial tribunals or procedures compatible with due process of law, which was not the case here.[135] The court also did not find any fraud in the process, nor did it consider the judgment or cause of action "repugnant to the public policy of the Unites States or of the State where the recognition is sought."[136]

The outcome of this decision may support the argument for recognition of decisions in favor of foreign administrative agencies (such as DPAs) for a sum of money, as long as they are not penal in nature and the process comports with due process of law including the possibility of judicial review. It should be emphasized though, that this is a recognition of foreign court judgment, not of an administrative decision directly and that no penalty was imposed by the ASC - it was a judgment for money owed to the state. Also, the proceedings before the ASC apparently reminded court proceedings, incl. notice, opportunity to be heard, testimonies, hearing panel etc. and there was an opportunity to appeal the decision at court.

2. Regierungspraesident Land Nordrhein Westfalen v. Rosenthal

Another case relevant to recognition of administrative decisions is Regierungspraesident Land Nordrhein Westfalen v. Rosenthal, 17 A.D.2d 145 (N.Y. App. Div. 1962). Here, the New

[132] *See* Restatement (Fourth) of the Foreign Relations Law of the United States, §481 Rpt's Note 6 (AM. LAW INST. 2018).

[133] The decision does not further specify the "investigative costs". Most likely, they will be the costs of the investigation of the fraud that might possibly include expert reports and testimonies, workforce, administrative costs etc.

[134] Arizona enacted the 2005 UFCMJRA, but it was following the common law as captured in Restatement (Third) at the time of the *Ryckman* decision.

[135] Alberta Sec. Comm'n v. Ryckman, 30 P.3d 121, 126 (Ariz. Ct. App. 2001).

[136] *Id.* at 130, referring to Restatement (Third) of the Foreign Relations Law of the United States, §482(2)(d) (AM. LAW INST. 2018).

York state court enforced a German administrative tribunal order revoking money award to a former German national and demanding repayment.

The court also mentioned the public policy exception to recognition, but decided that plaintiff's recovery here did not contravene any public policy.[137] In line with the analysis in this Report above, the court here made a distinction based on the substance of the claim (and the fact that the plaintiff here was not a private person, but the government, was irrelevant): "The object of the action is not 'vindication of the public justice', but 'reparation to one aggrieved' (citations omitted)."[138] The court further opined that there has not been "procedurally, any material departure from American standards of fairness" because the defendant was served with a copy of the award and there was "the opportunity for judicial review".[139] The fact that he did not use it did not matter. The defendant specifically argued the administrative award cannot be recognized, because it is not a judgment. The court refused this argument stating that: "Here, by reason of defendant's default in exercising his privilege of contesting the award in court, it became binding and subject to execution …."[140] In a footnote, the court referred to another decision of a New York court in *Philadelphia v. Cohen*, where the court held that "comity does not require enforcement of a tax liability imposed by a foreign administrative agency, although the liability had become final by reason of the taxpayer's failure to seek a review."[141] The *Rosenthal* court further contrasted the facts and reasoned:

> [T]he emphasis of the [*Cohen*] decision was on the nature of the liability, and we perceive no intimation that, where the liability is one which our courts would recognize under comity if determined by a foreign court, recognition is to be withheld merely because the determination, though it has achieved finality, is the product of a foreign administrative agency.

Rosenthal, 17 A.D.2d at 148.

In simpler terms, the decision in *Rosenthal* indicates that a final administrative decision can be eligible for recognition if the person opposing such recognition had at least an opportunity to obtain judicial review, if the purpose of the action is compensatory rather than to vindicate public justice and if the decision does not contravene the public policy.

3. Petition of Breau

Petition of Breau[142] is another case where a foreign administrative act was recognized in the United States. In this case the Supreme Court of New Hampshire recognized a decision of a Canadian administrative body that revoked the teacher's license to teach in Canada based on findings of lack of good moral character. The court noted that the teacher in this case had had two

[137] Regierungspraesident Land Nordrhein Westfalen v. Rosenthal, 17 A.D.2d 145, 147-148 (N.Y. App. Div. 1962).
[138] *Id*. at 148.
[139] *Id.*
[140] *Id.*
[141] Philadelphia v. Cohen, 11 N.Y.2d 401 (N.Y. 1962).
[142] Petition of Breau, 565 A.2d 1044 (N.H. 1989).

opportunities to appeal the findings against him in the Canadian proceeding and to examine the witnesses and that it was his own choice not to pursue the opportunities to contest such findings. The court specifically applied the rules for recognition of judgments stating: "[N]o issue has been raised here about the cognizability of a Canadian administrative judgment, as such, presumably because our domestic law accords preclusive effect to administrative judgments under the same conditions that apply to the judgments of a court (citation omitted)."[143]

4. Yahoo! Inc. v. La Ligue Contre Le Racisme

The most recent and very relevant precedent is the case of *Yahoo! Inc. v. La Ligue Contre Le Racisme*,[144] ultimately decided by the federal U.S. Court of Appeals for the Ninth Circuit (that includes California). The case dealt with (broadly) an issue whether the U.S. courts must help enforce injunctions and penalties against U.S. websites that had been imposed by foreign countries.

The facts of the case on which the Court based its decision are specific and the Court also dealt with various other issues and legal concepts, but the decision is highly indicative of the potential approach of the courts in California and even the United States in general to recognition and enforcement of foreign penalty decisions.

Only relevant parts of the decision will be analyzed here. The important facts of the case were as follows: Yahoo! was allowing its online auction service to be used for the sale of memorabilia from the Nazi period, contrary to French criminal law. French anti-discrimination groups led by La Ligue Contre Le Racisme et l'antisemitisme (LICRA) filed suit in French court. Yahoo! claimed that as an American company,[145] it was not subjected to French law. The French court determined that Yahoo! had violated French law and in its two subsequent interim orders required Yahoo! to restrict access to the listings for Nazi artifacts for French users and stipulated penalties per every day of delay. Yahoo! partially complied with the orders, but the French court has never actually imposed any penalty for violations of its orders.

Yahoo! was then seeking a declaratory judgment in the district court for the Northern District of California that the French court's judgments are unrecognizable and unenforceable in the United States for lack of jurisdiction and for conflict with free speech rights. (It is more typical that an affirmative judgment is being sought by the successful party, but the analysis of the relevant issues would be essentially similar.) It was a diversity suit,[146] brought by Yahoo! in federal district court in California. In diversity cases, enforceability of judgments of courts of other countries is

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[143] *Id*. at 1050.
[144] Yahoo! Inc. v. La Ligue Contre Le Racisme et l'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006).
[145] Yahoo! is a Delaware corporation with its principal place of business in California.
[146] Cases involving a controversy between citizens of different U.S. states or between citizens of a U.S. state and of a foreign nation are decided by federal courts under so called diversity jurisdiction (upon fulfilment of some other conditions).

generally governed by the law of the state in which enforcement is sought.[147] Therefore, the Court applied the California state law.[148] The Court stated:

> Insofar as the issue is whether the French court's orders are enforceable in California, it is clear that California law governs. However, it is less clear whose law governs when enforceability in other states is at issue. … [In] any event, the law of virtually all other states appears to be similar, or even identical, to California law.

Yahoo! Inc., 433 F.3d at 1213.

As stated above, California has adopted the Uniform Foreign Money-Judgments Recognition Act.[149] In line with the analysis in this Report above, the Court stated that this Act is not directly applicable, because it does not cover injunctions (only money-judgments), but at the same time the Court (pointing to the Saving Clause in Sec. 11 of the Act) admitted that the Act does not foreclose enforcement of such foreign injunctions.[150] In accordance with this provision, the Court proceeded to look into principles of comity followed by the California courts.[151] The Court stated (citing Restatement (Third) of the Foreign Relations Law of the United States §482(2)(d)):

> The general principle of enforceability under the Third Restatement is the same as under California's Uniform Act. That is, an American court will not enforce a judgment if "the cause of action on which the judgment was based, or the judgment itself, is *repugnant to the public policy* of the United States or of the State where recognition is sought[.]"

Yahoo! Inc., 433 F.3d at 1213.

According to the Court, "there is very little case law in California dealing with enforceability of foreign country injunctions under general principles of comity, but that law is consistent with the repugnancy standard of the Restatement."[152] The Court further gives examples of use of repugnancy standard in other states than California and in federal courts without reference to particular state law. The Court particularized that even judgments that conflict with American public policy or are based on foreign law that differs substantially from American state or federal law may be sometimes recognized and enforced unless they are *repugnant to public policy* (emphasis added).[153] The further analysis and opinion of the Court is very case specific since the *Yahoo!* case included the conflict with freedom of speech under the First Amendment to the U.S. Constitution. The gist of the Court's decision on this part is that the suit was not 'ripe' to be decided because it was difficult to know at this stage whether or not enforcement of the French interim

[147] *Yahoo! Inc.*, 433 F.3d at 1212-13 and the cases referred to therein.
[148] Both the district court and the Appeals Court.
[149] Currently the 2005 version and it is transponed into California Code of Civil Procedure Sec. 1713-1724.
[150] *Yahoo! Inc.,* 433 F.3d at 1213.
[151] *Id.*
[152] *Id.* at 1214.
[153] *Id.* at 1215.

orders would be repugnant to California public policy (the orders were 'interim' and it was not clear whether or not they were violated etc.). Further analysis is beyond the scope of this Report since every case that the DPAs will potentially want to enforce will have a different fact pattern and may or may not be considered 'repugnant to American public policy' in various ways and that will always have to be assessed on a case-by-case basis.

Further in the ruling, when analyzing the issue of "hardship to the parties" (caused if the Court would not decide the suit at this time) the Court explicitly dealt with the issue of "enforceability of the monetary penalty"[154] and stated:

> [E]ven if the French court were to impose a monetary penalty against Yahoo!, it is exceedingly unlikely that any court in California -- or indeed elsewhere in the United States -- would enforce it. California's Uniform Act does not authorize enforcement of "fines or other penalties." *Cal. Civ. Proc. Code § 1713.1(2)*. The Act includes a savings clause, *see Cal. Civ. Proc. Code § 1713.7*, but the fine is equally unenforceable under California common law doctrine. (emphasis added) California courts follow the generally-observed rule that, "unless required to do so by treaty, no state [i.e., country] enforces the penal judgments of other states [i.e., countries]." (citation omitted)

Yahoo! Inc., 433 F.3d at 1218. The Court also refers to similar declarations in Restatement and other case law and concludes that such common law rule is venerable and widely-recognized.[155]

The Court further stipulates that the test whether the judgment is considered penal or not by the court that is asked to enforce it does not depend on the name of the statute on which the judgment is based, but rather on whether it is "a punishment of an offense against the public, or a grant of a civil right to a private person."[156]

The Court also makes clear that even a civil remedy is penal "if it awards a penalty to a member of the public, suing in the interest of the whole community to redress a public wrong."[157] Examples of such civil remedies that are penal in nature mentioned by the Court are an award of punitive damages, order of contempt or even a "restitution" in the form of publication of judgment.[158] The Court seems to conclude that only judgments awarding compensatory damages

[154] *See Id.* at 1218-1220.
[155] *Id.* at 1219.
[156] *Id.* citing Huntington v. Attrill, 146 U.S. 657, 13 S. Ct. 224, 36 L. Ed. 1123 (1892) at 682; *see also* Ducharme v. Hunnewell, 411 Mass. 711, 714, 585 N.E.2d 321 (1992) (determining that whether a judgment requires enforcement "depends on whether its purpose is remedial in nature, affording a private remedy to an injured person, or penal in nature, punishing an offense against the public justice").
[157] *Yahoo! Inc.,* 433 F.3d at 1219, citing Weiss v. Glemp, 792 F. Supp. 215, 227 (S.D.N.Y. 1992) and referring to Loucks v. Standard Oil Co., 224 N.Y. 99, 101, 120 N.E. 198 (1918) (Cardozo, J.).
[158] *Id.* at 1219-20, the cases cited therein and Restatement (Third) of the Foreign Relations Law of the United States § 483 cmt. b. (AM. LAW INST. 2).

to injured parties are not penal in nature.[159] To the contrary, judgments designed to deter conduct or benefit the general public would be considered penal.

Again, it can be concluded that the decisive element for the Court was whether the order is primarily compensatory (benefiting the injured party) or punitive (benefiting the general public) in nature, no matter the character of the procedure (civil, administrative, criminal) or the underlying legal regulation.

5. <u>Practical Implications for Enforcement of GDPR by DPAs</u>

In the light of the above analysis of the relevant U.S. legal rules and court decisions, it can be quite safely concluded that DPA's penalty decisions for GDPR violations or any judgments confirming the penalty or adjudicating such penalties *de novo* would be effectively unenforceable in the United States because they would be considered penal in nature and there is no statute or international agreement to authorize such enforcement.

If a private party successfully sues for GDPR infringement in the court of an EU member state, the potential enforceability of such judgment would depend on its character. It would still not be enforceable if the remedy would be "penal in nature" (such as exemplary or punitive damages). On the other hand, the judgment will be likely eligible for recognition and enforcement if it awards compensatory damages to concrete injured parties – subject to fulfillment of other requirements under the relevant U.S. law. (Enforcement of civil remedies in the United States is beyond the scope of this Report, but the requirements are essentially the same as outlined in chapter II. C above).

The question remains whether there might be any occasion when the DPA's enforcement decision is eligible for recognition and enforcement in the Unites States. First, the decision must be final, conclusive and enforceable in the issuing country. Second, the proceedings at the DPA must be consistent with due process, at minimum there must be proper jurisdiction, notice and at least a genuine opportunity to contest the decision at court. Third, it cannot be a decision imposing a penalty or any form of *punishment*. It would have to be an order for something *compensatory* in nature (like compensation for investigative costs that was recognized in the *Rykman* case). Fourth, it should be ascertained that there is no conflict with fundamental values like freedom of expression protected under the First Amendment. Fifth, although there is a good argument that administrative decisions are to be recognized in the same manner as judgments, it might still be advisable to seek declaratory judgment from court or some form of court decision confirming the administrative decision.

[159] "The penalties are payable to the government and not designed to compensate the French student groups for losses suffered." *Yahoo! Inc.,* 433 F.3d at 1220.

F. Other Aspects of Enforcement of Foreign Orders in the United States

1. The Act of State Doctrine not Applicable to Foreign Judgments or Administrative Acts

The EDPB Enforcement Study (Sec. 2.2.3.1 (k) at p. 23) states that: "[t]he 'Act of State Doctrine' seems to allow for the recognition of the validity of foreign government acts." This is a misleading statement. To avoid confusion, it should be noted that the 'act of state doctrine' in the U.S. law is completely irrelevant and explicitly nonapplicable for recognition and enforcement of foreign judgments or administrative acts in the US territory: "The act of state doctrine does not apply to foreign-court judgments. … For similar reasons, an administrative determination of liability by a foreign state, whether or not it has been confirmed by a judicial decision, is not subject to the act of state doctrine for purposes of a suit in a court in the United States to enforce that liability."[160]

The act of state doctrine precludes American courts from questioning the validity of acts conducted by a foreign sovereign within that foreign sovereign's borders.[161] This doctrine in a nutshell only acknowledges countries' sovereignty and the principle of non-interference with one another's internal affairs. Grounded on principles of international comity the U.S. Supreme Court reasoned in *Underhill v. Hernandez*: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."[162] (emphasis added) The last bit is the essence of the concept and it can by no means be concluded that this doctrine could be used as a basis for enforcement of foreign administrative penalty decision against an entity or property within the U.S. territory.[163] The act of state doctrine is a federal common law that overrides any potential state law to the contrary.[164]

2. Relevance of U.S. State Privacy Laws and Federal Laws to Enforcement of DPA's Penalties

This section aims to answer the following question of the EDPB: *"As the example is set in the US, is the answer to any of the above [EDPB] questions different in individual U.S. states where privacy laws apply (such as the CCPA in California) or at federal level if enforcement concerns a violation of already protected rights (such as children in COPPA or health data in HIPAA), or if a federal privacy law is passed?"*

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[160] Restatement (Fourth) of the Foreign Relations Law of the United States §441 Rpt's Note 9 (*Nonapplicability to foreign judgments*) (AM. LAW INST. 2018); *see also id.* §441 cmt c.
[161] *See id.* §441 (1): "In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will assume the validity of an official act of a foreign sovereign performed within its own territory."
[162] Underhill v. Hernandez, 168 U.S. 250, 252 (1897).
[163] For detailed account of the doctrine, *see, e.g.*, Juan X. Franco, *Abuses of the Act of State Doctrine*, 50 U. Mem. L. Rev. 655 (2020).
[164] *See* Restatement (Fourth) of the Foreign Relations Law of the United States §441 cmt. b (AM. LAW INST. 2018).

The answer to this question is no and yes, in this order. The below paragraph provides a little bit of context and summary of the legislative background.

There are currently comprehensive consumer privacy laws signed in 15 U.S. states and in many other states legislative bills are in various stages of the legislative process.[165] It should be noted that those laws are consumer privacy laws with varied types and levels of protections and that none of the states has a comprehensive general privacy law such as GDPR. As explained above, the United States follow so called sectoral approach and that is also true for state level legislation. Accordingly, in every state there are state laws in various sectors or on a specific privacy aspect that provide different levels of protection (e.g. biometric privacy laws, data breach laws, genetic information privacy laws etc.). California has been a pioneer in privacy laws and even if its privacy laws are probably the most 'protective' in the United States, the level of protection, the mechanisms, the penalties and generally the vision of privacy are different to the ones in the GDPR. California is also the only state with a specialized privacy protection agency who can enforce the respective legislation. In other states, the consumer privacy laws are typically enforced by state Attorneys General. Some of the laws include so called 'private right of action', i.e. the right of individuals to sue in court. If the law does not include this right, it can only be enforced by government. Federal laws also follow the sectoral approach and who can enforce them depends on the law in question. The main privacy enforcer in the U.S. is the FTC. The FTC can generally bring enforcement actions for violation of Section 5 of the FTC Act, which bars "unfair and deceptive acts and practices in or affecting commerce," but it can also enforce other federal laws, such as financial privacy law (GLBA) or children privacy act (COPPA). As regards the comprehensive federal privacy law: There have been many legislative bills over the last years, but none of them made it too far in the Congress. There are conceptual difficulties on various levels and there is no sufficient agreement at the moment to pass the law. Therefore, the prospects of enacting a comprehensive federal privacy law in the near future are bad. If this law is ever passed at all it is not clear whether it will preempt the state laws, how will it relate to the existing federal privacy laws etc. It is clear, though, that it will definitely not look like GDPR, just because the U.S. approach to privacy and data protection is fundamentally different than the one in the EU. The right to privacy and data protection are not deemed fundamental human rights and they are not constitutionally protected. The individuals are viewed more like market participants and the main idea in all of the privacy laws is to give individuals more control over 'their' data rather than protect them by default. In addition, there will always be a significant conflict between privacy and free speech in the United States and in many of the situations that would be deemed harmful and violating human rights in the EU, there will be a defense based on free speech and First Amendment.

Back to the EDPB's question: The existence of state or federal laws in the area would not help with the enforcement of fines imposed by DPAs in any formal way. These laws typically do not contain any specific mechanisms in this respect, even the California privacy law contains just one brief vague sentence regarding foreign cooperation: "The CPPA has the power to cooperate with other privacy enforcement agencies in the state, as well as in other states, territories, and

[165] As of April 11, 2024.

countries."[166] The general rules on recognition and enforcement, as analyzed in this Report above, would still apply.

However, the existence of such laws and this common tendency to protect privacy between the EU and the United States may potentially be an argument in the recognition proceedings and specifically when it comes to the comity and the public policy argument. Naturally, there will be a better prospect for recognition of a decision that follows the same fundamental values as are those in the state where the recognition is sought. Or if the violation underpinning such decision is materially similar to one that is included in the domestic law. Yet, all other elements required for recognition need to be met. Therefore, the outcome might be different depending on the specific facts.

In the specific case of *Locatefamily* and the fine for not appointing a local representative in the EU, that argument would quite certainly not help. First of all, it would be considered a 'penal judgment', second of all, there is no similar provision in any of the local laws, and third of all, no fundamental value has been violated. It may be different though if violation of some more fundamental value occurs. If the decision of the DPA/EU court is still for a penalty, it may not be enough for recognition any way (as it is still 'a penal judgment' in nature). Yet, it would be less clear in this case and at least it might be possible to make the argument for recognition based on comity and same public policy.

Same goes to investigative powers: There will be no formal mechanism in place, but certainly, the DPA will have a much better chance to get assistance in situations where the violation would be a violation of the local law as well. Most of the 'soft law' cooperation tools and arrangements even require this.

3. Special Regime - Cooperation and Enforcement within the EU-U.S. Data Privacy Framework

a) Scope and Limits

On July 10 2023, the European Commission adopted its adequacy decision for the EU-U.S. Data Privacy Framework (EU-U.S. DPF).[167] As a result, personal data[168] can be transferred from

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[166] California Consumer Privacy Act (2018), as amended by California Privacy Rights Act (2020), Sec. 1798.199.40 (i).

[167] COMMISSION IMPLEMENTING DECISION pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-U.S. Data Privacy Framework (10.7.2023), at https://commission.europa.eu/document/download/fa09cbad-dd7d-4684-ae60-be03fcb0fddf_en?filename=Adequacy%20decision%20EU-US%20Data%20Privacy%20Framework_en.pdf (last accessed on February 25, 2024)

[168] "[W]ith the exception of data that is collected for publication, broadcast or other forms of public communication of journalistic material and information in previously published material disseminated from media archives. [footnote omitted] Such information can therefore not be transferred on the basis of the EU-U.S. DPF." *Id.*, Sec. 2.1.2. para (10).

the EU entities to the U.S. entities that have certified into the program without the need to obtain any further authorization.[169]

First of all, it must be noted that any type of cooperation or enforcement within the EU-U.S. DPF is limited to certain specific situations. Such enforcement cooperation is not generally available for any GDPR violations and it does not involve collection of fines imposed by DPAs overseas. It may be, however, relevant and useful for the DPAs when considering taking an enforcement action in situations in which the EU-U.S. DPF regime applies. In-depth analysis of the framework would be beyond the scope of this Report, but certain features and mechanisms that are potentially relevant for the DPAs will be described.

This regime is only relevant for personal data transfers between the EU and the United States. The direct application of GDPR by operation of Art. 3(2) is not affected.[170] A major limitation of any potential enforcement under this regime is the personal scope - it can only regard U.S. organizations that self-certify into the program. In addition, the organizations only certify to comply with certain general principles (seven key principles such as the notice principle, the purpose limitation or security principle, and several supplementary principles), not with the GDPR as such.[171]

Therefore, this regime would be irrelevant in cases like *Locatefamily*, where the company has not certified into the regime and the fine was imposed for a violation that is not included within the covered principles.[172] But there may be occasions in the future where the violator will be an organization certified under the program[173] and the violation will be within the framework's scope. It is therefore advisable for the DPAs when considering investigating or taking an enforcement action against a U.S. based organization to always check whether or not such organization participates in the EU-U.S. DPF and whether the violation falls within the scope of the regime.

The program is administered and monitored by the U.S. Department of Commerce (DoC) and the compliance by the U.S. organizations with their obligations is enforced by the FTC and the U.S. Department of Transportation (DoT), as applicable. Once an organization publicly commits to comply with the EU-U.S. DPF principles, that commitment becomes enforceable under the U.S. law. It must be noted that the enforcement is primarily in the hands of the U.S. enforcement entities under the U.S. rules and mechanisms. The participating organizations do not submit themselves to the enforcement authority of any EU institution/agency. That means that any

[169] As provided for in Article 45(1) and recital 103 of the GDPR.

[170] *See* COMMISSION IMPLEMENTING DECISION pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-U.S. Data Privacy Framework (10.7.2023), Sec. 1, para. (8). There can be potentially occasions when there is an overlap – for example if the receiving entity participating in the DPF is also subject to GDPR under Art. 3(2) for the given processing as a joint-controller.

[171] For details *see id.,* Annex 1 (EU-U.S. DATA PRIVACY FRAMEWORK PRINCIPLES ISSUED BY THE U.S. DEPARTMENT OF COMMERCE).

[172] Unless it certified under a different company name. In any case, in similar cases where the DPA cannot even ascertain the identity of the company, it would be impossible to know whether they certified or not.

[173] See the current list here: https://www.dataprivacyframework.gov/list (last accessed on February 25, 2024).

penalties already imposed by the DPAs would not be recognized or enforced in the United States based on this framework. But there might be other types of cooperation available, such as cooperation in early stages and leaving the penalty imposition/other enforcement action on the U.S. enforcer.

b) Provisions of the EU-U.S. DPF Relevant for DPAs (Cooperation Opportunities and Enforcement Assistance)

There are two instances envisaged within the framework in which the participating U.S. organizations must interact directly with the DPAs. First, the organizations that process human resources data collected in the context of an employment relationship must cooperate in the investigation and the resolution of a complaint by a DPA when it concerns processing of such data.[174] Second, when the organizations have specifically chosen to cooperate with DPAs and committed thereto in their self-certification submission to the DoC.[175] The organization then must declare that it "will cooperate with the DPAs in the investigation and resolution of complaints brought under the Principles; and will comply with any advice given by the DPAs where the DPAs take the view that the organization needs to take specific action to comply with the Principles, including remedial or compensatory measures for the benefit of individuals affected by any noncompliance with the Principles, and will provide the DPAs with written confirmation that such action has been taken."[176] There is a specific mechanism for delivering the "advice of the DPAs" envisaged in the framework – via informal DPAs panels.[177] If the organization fails to comply within 25 days without satisfactory explanation for the delay, the matter may be referred to the FTC, the DOT, or other U.S. federal or state body with statutory powers to take enforcement action.[178] In simpler terms, the DPAs do not have any direct enforcement powers over the violators even in these specific cases.

The DoC committed to increase opportunities for cooperation with DPAs and for this purpose to appoint a dedicated point of contact to act as a liaison with DPAs.[179] "In instances where a DPA believes that a EU-U.S. DPF organization is not complying with the Principles,[180] the DPA will be able to reach out to the dedicated point of contact at the [DoC] to refer the

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[174] *See* COMMISSION IMPLEMENTING DECISION pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-U.S. Data Privacy Framework (10.7.2023), Sec. 2.4, para. 73.

[175] The organizations are required to implement some "independent recourse mechanism" and this requirement may be satisfied in different ways, one of them being "commitment to cooperate with DPAs located in the EU or their authorized representatives." See Annex 1 (EU-U.S. DATA PRIVACY FRAMEWORK PRINCIPLES ISSUED BY THE U.S. DEPARTMENT OF COMMERCE) to the COMMISSION IMPLEMENTING DECISION pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-U.S. Data Privacy Framework (10.7.2023), General Principle 7 and Supplemental Principles 5 and 11.

[176] *Id.* Supplemental Principle 5.

[177] For details *see id.* Supplemental Principle 5.

[178] *Id.*

[179] *See* Annex 3 to the COMMISSION IMPLEMENTING DECISION pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-U.S. Data Privacy Framework (10.7.2023).

[180] Including following a complaint from an EU individual.

organization for further review."[181] The DoC will then try to resolve the complaint with the organization and should update the DPA within 90 days after receipt of the complaint. The DPAs can also report the organizations that falsely claim to participate in the EU-U.S. DPF. The dedicated point of contact should also assist DPAs when they seek information regarding particular organization's self-certification or implementation of EU-U.S. DPF requirements.

There are periodic joint meetings between DoC (and other agencies, as appropriate) and the European Commission, interested DPAs, and appropriate representatives from the EDPB, that "will include discussion of current issues related to the functioning, implementation, supervision, and enforcement of the Data Privacy Framework program."[182]

The FTC committed to enforcement of the EU-U.S. DPF principles: "[W]e affirm our commitment in three key areas: (1) referral prioritization and investigations; (2) seeking and monitoring orders; and (3) enforcement cooperation with EU data protection authorities ("DPAs")."[183] The FTC can enforce compliance by seeking administrative or federal court orders for preliminary or permanent injunctions or other remedies. Where organizations fail to comply with such orders, the FTC may seek civil penalties and other remedies.[184] As regards investigative powers, FTC cannot conduct on-site inspections in the area of privacy protection, but it has the power to compel organizations to produce documents and provide witness statements and may use the court system to enforce such orders in case of non-compliance.[185]

The FTC committed to "exchange information on referrals with referring enforcement authorities."[186] The FTC has designated an agency point of contact for EU Member State referrals.

The FTC states that it "will also work closely with EU DPAs to provide enforcement assistance. In appropriate cases, this could include information sharing and investigative assistance pursuant to the U.S. SAFE WEB Act, which authorizes FTC assistance to foreign law enforcement agencies when the foreign agency is enforcing laws prohibiting practices that are substantially similar to those prohibited by laws the FTC enforces."[187] But there are several other conditions for permissible use of this authority by FTC, such as reciprocity, no conflict with the public interest of the United States and there must be a risk of injury to a significant number of persons.[188] The

[181] Annex 3 to the COMMISSION IMPLEMENTING DECISION pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-U.S. Data Privacy Framework (10.7.2023).

[182] *Id.*

[183] *See* Annex IV to the COMMISSION IMPLEMENTING DECISION pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-U.S. Data Privacy Framework (10.7.2023).

[184] *See* COMMISSION IMPLEMENTING DECISION pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-U.S. Data Privacy Framework (10.7.2023), Sec. 2.3.4.

[185] *Id.*

[186] *See* Sec. IV of Annex IV to the COMMISSION IMPLEMENTING DECISION pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-U.S. Data Privacy Framework (10.7.2023).

[187] *Id.*

[188] For details see 15 U.S.C. § 46(j)(3).

assistance in this case can include information sharing, "issu[ing] compulsory process on behalf of the EU DPA conducting its own investigation, and seek[ing] oral testimony from witnesses or defendants in connection with the DPA's enforcement proceeding, subject to the requirements of the U.S. SAFE WEB Act."[189]

For the sake of completeness, the framework also provides for a mechanism for the enforcement of individual rights based on complaints by data subjects, but that is beyond the scope of this Report.[190]

[189] *See* Sec. IV of Annex IV to the COMMISSION IMPLEMENTING DECISION pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-U.S. Data Privacy Framework (10.7.2023).

[190] *See* COMMISSION IMPLEMENTING DECISION pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-U.S. Data Privacy Framework (10.7.2023), Section 2.4.

ANNEX 1: ABBREVIATIONS

CCPA	California Consumer Privacy Act (2018), as amended by California Privacy Rights Act (2020)
CPPA	California Privacy Protection Agency
CJEU	Court of Justice of the European Union
DoC	U.S. Department of Commerce
DoT	U.S. Department of Transportation
DPA	Data Protection Authority in any EU country (also "SA")
EDPB	European Data Protection Board
EDPB Enforcement Study	*Study on the enforcement of GDPR obligations against entities established outside the EEA but falling under Article 3(2) GDPR*, Milieu Consulting SRL for the benefit of EDPB, November 2021
EU	European Union
EU-U.S. DPF	EU-U.S. Data Privacy Framework (COMMISSION IMPLEMENTING DECISION pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-U.S. Data Privacy Framework from July 10, 2023)
FTC	U.S. Federal Trade Commission
GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1
Global CAPE	Global Cooperation Arrangement for Privacy Enforcement
NL DPA	Netherlands Data Protection Authority (Autoriteit Persoonsgegevens)
SA	Data Protection Authority in any EU country (also "DPA")
ToR	Terms of Reference: How to take enforcement action on the GDPR outside of the EU, Annex 2 to Contract No. 2023-008 between EDPB and Helena Kastlová from November 22, 2023

UFMJRA	The Uniform Foreign Money-Judgments Recognition Act
UN	United Nations
U.S.	United States of America

ANNEX 2: LIST OF RESOURCES

Cases

United States:

Alberta Sec. Comm'n v. Ryckman, 30 P.3d 121 (Ariz. Ct. App. 2001)
Carpenter v. United States, 585 U.S. 296, 138 S. Ct. 2206 (2018)
De Brimont v Penniman, 7 F Cas 309 (CCSDNY 1873)
Ducharme v. Hunnewell, 411 Mass. 711, 714, 585 N.E.2d 321 (1992)
Ford Motor Co. v. Montana Eighth Judicial District Court, 592 U.S. ___ (2021)
Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984)
Hilton v. Guyot, 159 U.S. 113 (1895)
Huntington v. Attrill, 146 U.S. 657, 673-674 (1892)
International Shoe Company v. Washington, 326 U.S. 310 (1945)
Kyllo v. United States, 533 U.S. 27 (2001)
Olmstead v. United States, 277 U.S. 438 (1928)
Petition of Breau, 565 A.2d 1044 (N.H. 1989)
Philadelphia v. Cohen, 11 N.Y.2d 401 (N.Y. 1962)
Regierungspraesident Land Nordrhein Westfalen v. Rosenthal, 17 A.D.2d 145 (N.Y. App. Div. 1962)
Underhill v. Hernandez, 168 U.S. 250, 252 (1897)
Yahoo! Inc. v. La Ligue Contre Le Racisme et l'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006)

International:

S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

Statutes

United States:

California Consumer Privacy Act (2018), as amended by California Privacy Rights Act (2020)
U.S. SAFE WEB Act of 2006

International treaties and agreements

Agreement on mutual legal assistance between the European Union and the United States of America (2003)
Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019

Treaty between the United States of America and the Czech Republic on Mutual Legal Assistance in Criminal Matters, February 4, 1998

Treaty between the United States of America and the Republic of Poland on Mutual Legal Assistance in Criminal Matters, July 10, 1996

United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

Other international documents

International Law Commission (ILC), Report on the Work of its Fifty-Eighth Session (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10

Memorandum of Understanding between the United States Federal Trade Commission and the Dutch Data Protection Authority on Mutual Assistance in the Enforcement of Laws Protecting Personal Information in the Private Sector (July 2019)

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