

# The EU General Data Protection Regulation

January 17, 2017

## Introduction

After years of discussions, the General Data Protection Regulation (the GDPR), has finally been adopted and is due to come into effect 25 May 2018. The GDPR will replace the current Data Protection Directive and will be directly applicable in all EU member states. As a consequence, the Dutch Data Protection Act will be repealed.

The GDPR will bring significant and substantial changes with respect to the processing of personal data. It introduces several new concepts, such as privacy by design, privacy by default and data portability. As the GDPR contains several onerous obligations that require significant preparation time, organisations would do well to timely commence the implementation process.

From January 2017 until the entry into force of the GDPR in May 2018, we will provide you with a monthly practical overview of the relevant changes and most important requirements resulting from the GDPR. An overview of the subjects of our monthly updates is included at the end of this newsletter.

This month's issue: the expanded territorial scope of the GDPR. The practical effect of the expansion of the territorial scope is that many non-EU organisations which are currently not subject to EU data protection laws may be directly subject to the GDPR. The GDPR requires these organisations to respond in due time in order to be compliant.

## Territorial scope

Under the GDPR, the territorial scope of the European data protection rules is expanded.

Firstly, the GDPR applies to organisations with an establishment in the EU where personal data are processed in the context of the activities of such an establishment (irrespective whether or not the processing of personal data takes place in the EU).

The concept of 'establishment' should be interpreted broad and flexible. It requires a real and effective activity - even a minimal one - exercised through stable arrangements. The legal form of such arrangements (e.g. a branch or subsidiary with legal personality) is not the determining factor. Consequently, the presence of a single representative may be sufficient.

It is not required that the establishment carries out the processing of personal data but that the processing is carried out in the context of the activities of the establishment. If the activities of the establishment and the parent company are inextricably linked (for instance, if the subsidiary exists to make the parent company economically profitable), the associated processing of personal data will likely be subject to the GDPR.

Consequently, if there is an inextricable link between the activities of an EU establishment (such as a local advertising branch or sales office) and the processing of personal data carried out by a non-EU organisation, the GDPR will apply to that processing by the non-EU organisation.

Secondly, the GDPR applies to the processing of personal data of EU data subjects by a non-EU organisation, if the processing relates to the offering of goods and services to EU data subjects, irrespective of whether or not the EU data subjects pay for the goods and/or services.

A non-EU organisation will be considered to offer goods or services to EU data subjects, if it has the intention to offer such goods or services to EU data subjects. The mere accessibility of its website or contact addresses from the EU or the use of a language generally used in the country where the organisation is established, are in principle insufficient. The use of an EU language and/or currency, references to EU customers or users, the use of ads in a search engine directed at one or more EU member states or the use of a top-level domain name (such as .EU or .NL) may make it apparent that the services and/or goods are aimed at EU data subjects.

Thirdly, the GDPR applies to the processing of personal data of EU data subject by a non-EU organisation if the processing relates to the monitoring of the behaviour of the data subjects within the EU.

The monitoring of EU data subject will occur, inter alia, if the data subjects are tracked on the internet, including potential subsequent use of personal data processing techniques that consist of profiling data subjects, particularly with a view to take decisions concerning the data subjects and/or predicting the data subjects' preferences, behaviours and attitudes.

At this stage it is unclear how extensive the tracking of EU data subjects must be for the GDPR to apply. Websites using tracking cookies and apps that track usage will in principle be caught by the GPRD, to the extent they collect personal data. Further, the Court of Justice of the European Union recently determined that dynamic IP addresses may qualify as personal data. Consequently, websites owners that keep logs of dynamic IP addresses that visit their website may fall within under the GDPR's scope.

## Next steps

Organisations should consider if their businesses are likely to fall under the territorial scope of the GDPR. Especially, because the criteria 'establishment' and 'offering goods or services' are interpreted broadly. Making changes to ensure compliance with the GDPR will require considerable time, planning and resources. Especially for non-EU organisations that are currently not subject to the EU data protection laws and which may therefore have to significantly update their internal processes.

## Overview of subjects

January 2017	Territorial scope of the GDPR
February 2017	The Concept of Consent
March 2017	Sensitive Data
April 2017	Accountability, Privacy by Design and Privacy by Default
May 2017	Rights of Data Subjects (information notices)
June 2017	Rights of Data Subjects (access, rectification and portability)
July 2017	Rights of Data Subjects (objection, erasure and restriction of processing)
August 2017	Data Processors

September 2017	Data Breaches and Notifications
October 2017	Privacy Impact Assessment and Data Protection Officers
November 2017	Transfer of Personal Data (outside the EEA)
December 2017	Regulators (competence, tasks and powers)
January 2018	One Stop Shop
February 2018	Sanctions
March 2018	Processing of Personal Data in Employment
April 2018	Profiling and Retail
May 2018	Overview

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