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## **How will the new *EU Data Protection Regulation* affect your business?**

The new European Union (EU) General Data Protection Regulation (the “GDPR” or the “New Regulations”) adopted by the 28 EU members will take effect on 25<sup>th</sup> May 2018 and impose major changes to the way data is collected and processed by companies, including those companies located outside the EU but that happen to process personal data of data subjects residing in the EU.

With the New Regulations every organisation is likely to be impacted in different ways, depending on a range of factors such as the sector in which they operate, the nature and volume of personal data processed, and existing measures related to data protection within the current operating model.

Although the key principles of data privacy still hold true to the previous Directive (EU Data Protection Directive 95/46/EC), many changes have been proposed to the regulatory policies as below summarised:

### **1. Applicable to all collectors and processors no matter where the business is located**

The biggest change to the regulatory landscape of data privacy comes with the extended jurisdiction of the GDPR. Indeed, all businesses, even though located outside the EU, should be on notice that the New Regulations will apply to the processing of personal data by controllers and processors in the EU, regardless of whether the processing takes place in the EU or not. It also applies to the processing of personal data of data subjects in the EU by a controller or processor not established in the EU, where the activities relate to: offering goods or services to EU citizens (irrespective of whether payment is required) and the monitoring of behaviour that takes place within the EU.

These New Regulations clarify the uncertainty of the application of the previous Directive which provided that only businesses with an “establishment” in the UE had to be compliant with the data protection regulations.

### **2. The Consent of the Data Subject must be intelligible, unambiguous and specific**

With the implementation of the GDPR, obtaining an intelligible, freely given and unambiguous consent to collect and process personal data of data subject residing on the EU territory is now required. Absent strict compliance with these requirements administrative penalties apply as defined below.

Furthermore, consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, consent should be given for all of them. If the data subject's consent is to be given following a request by electronic means, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided.

This requirement could be materialised by, for example, ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data. Silence, pre-ticked boxes or inactivity should not therefore constitute consent.

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### **3. Risk of high administrative fines in case of breach of the New Regulations**

Another major change with the implementation of the GDPR is the risk of being sanctioned by administrative fines which can reach up to 4% of the annual global turnover of the infringement company or up to €20 Million.

Additionally, next to the administrative fines, the GDPR makes it considerably easier for individuals to bring private claims against data controllers and processors and be granted with compensation.

Those financial threats shall be taken seriously by all companies which shall implement sufficient measures to be compliant with these new Regulations.

### **4. Appointment of Data Protection Officers (DPO)**

Under the GDPR, there will be internal record keeping requirements and DPO appointment will be mandatory only for those controllers and processors whose core activities consist of processing operations which require regular and systematic monitoring of data subjects on a large scale, or of special categories of data, or data relating to criminal convictions and offences. Persons in this position will be independently responsible for ensuring the New Regulations are implemented and followed at all levels of the enterprise. The DPO will also serve as the main representative contact for authorities investigating security incidents.

### **5. Necessity of appointing a representative of controllers or processors which are not established in the EU**

Where a controller or a processor not established within the EU is processing personal data of data subjects who are in the Union and, whose processing activities are related to the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union, or to the monitoring of their behaviour as far as their behaviour takes place within the Union, the controller or the processor should designate a representative, a natural or legal person established in the EU, unless the processing is occasional, does not include processing, on a large scale, of special categories of personal data or the processing of personal data relating to criminal convictions and offences, and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing or if the controller is a public authority or body.

### **Conclusion:**

This summary outlines that it is fundamental that all companies take sufficient measures to be compliant with the New Regulations. The first step would be to analyse what data is being collected, why it is being collected, how it is being processed, and by whom. Establishing this data assessment to the satisfaction of the GDPR may require a full information audit but mostly would avoid the risk of suffering substantial fines and penalties.

Each company that collects and processes data should review their current consent requests and make any necessary adjustments to achieve GDPR compliance as defined above. Contracts will need to be renegotiated to ensure GDPR compliance and commercial terms will inevitably have to be revisited in many cases.

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