Eurovision: How GDPR is Changing the Compliance Landscape

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What is the GDPR?

- The **General Data Protection Regulation** ("GDPR") 2016/679 of the European Union ("EU").
- Provides data protection and privacy protections to individuals in the EU: fundamental rights in the EU.
- Penalties of up to greater of 4% of revenue or €20M (USD$20M+).
- Enforced by member state Data Protection Authorities alongside the European Data Protection Board.

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What does the GDPR regulate?

- Regulates the "processing" of "personal data."
  - **Processing** includes any operation performed on personal data.
  - **Personal data** is any information relating to an identified or identifiable data subject (person).
  - What about data that is encrypted, anonymized, or "pseudonymized"?
- Processing can be by a "controller" or a "processor."
  - A **controller** determines the purposes and means of processing.
  - A **processor** processes on behalf of a controller.

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What does the GDPR require?

- Data processing must be lawful.
- Data subject rights.
- Must engage processors under contract, which are subject to separate requirements.
- Requirements related to data transfer.
- Appoint a DPO.
- Data security and breach notification requirements.

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Common Misconceptions about Scope

For a US business, GDPR is **not** triggered simply by:

- Operating a website that is accessible in the EU.
- Conducting business with EU citizens that are located in US.
- Collecting email addresses from visitors to your website.

Both controls and processors are directly regulated by GDPR (not just "processor follows controller"), and each should independently conduct applicability analysis.

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Territorial Scope

1. Where the processing is "in the context of" activities of an entity **established in the EU**, even if processing is not in the EU.
    - Does not require data subject in the EU.
    - Question is *not* just whether you are established in the EU or whether you process data in the EU.
        - Establishment implies "effective and real exercise of activity through stable arrangements." Legal form is not dispositive. Can be single employee.
        - "In the context of": What is the relationship between the establishment and the controller or processor outside of the EU? Is the processing inextricably linked to revenue raising in the EU?

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Territorial Scope

2. Where the entity is not established in the EU but **offers goods or services to individuals in the EU**.
    - "*Envisage*" offering good or services requires intentionality and not "mere accessibility" of a website.
    - Relevant factors may include: use of EU or MS name, use of non-home country EU language, EU currency, targeted advertising, EU or EU MS website domain, local contact, or paid inclusion of a site on a local search engine.
    - An individual physically in the EU when the triggering activity takes place.
    - No payment requirement.
    - Would cover processing by a processor related to the targeting.

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Territorial Scope

3. Where the entity **monitors the behavior** (in the EU) of individuals in the EU.
    - Again, anyone present in the EU but only with regard to behavior in the EU.
    - "Monitoring" implies having a specific purpose in mind.
    - Monitoring of EU behavior includes tracking of online activities for subsequent profiling of personal preferences, behaviors, or attitudes.
    - Would cover processing by a processor related to the targeting.
4. Where the law of an EU Member State applies by virtue of **international law**.

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How else might the GDPR affect you?

1. GDPR comes up in a contract.

- You're asked to comply with the GDPR.
- You are positioned as a controller versus a processor.
  - *Controllers* may engage only processors that can ensure its full compliance.
  - *Processors* may process only by written contract specifying details of processing relationship, ensuring compliance with security and data breach requirements, and will assist the controller in its compliance.

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How else might the GDPR affect you?

2. You are involved in a data transfer from the EU.

- GDPR limits cross border data transfers – may only transfer data if:
  - Adequate level of protection (no Privacy Shield)
  - Standard Corporate Clauses (but *Schrems II*)
  - Binding Corporate Rules
- Derogations for occasional and non-repetitive transfers with a lawful basis for the processing.

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Is the GDPR coming to the US?

- Current status of the ADPPA and related bills
- Sticky issues
  - Preemption
  - Private right of action
  - Exemptions
- How is the GDPR affecting the conversation?

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Questions/Discussion

If you would like to ask a question, you can ASK or type your question into the CHAT feature NOW.

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